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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 141

HILARY HALBERT, JR., DOROTHY HALBERT BUBBLE, MILDRED HALBERT, A MINOR, ETC., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 142

RICH HALBERT, A MINOR, BY FRED P. HALBERT, GUARDIAN AD LITEM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 143

VERNON SIDNEY HALBERT, A MINOR, BY BENJAMIN F. HALBERT, GUARDIAN AD LITEM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 144

SIDNEY E. HALBERT, A MINOR, BY SIDNEY SETH HALBERT, GUARDIAN AD LITEM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 145

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE, AND AMELIA PEERS ALDEN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 146

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, ETC., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 147

MARY BARICHIO PETIT AND NORRIS PETIT, ELLIS A. PETIT, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

(OVER)

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SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA

No. 145

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE, AND AMELIA PEERS ALDEN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 14, 1930

No. 146

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, ETC., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 147

MARY BARICHIO PETIT AND NORRIS PETIT, ELLIS A. PETIT, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 148

DEWEY BARICHIO AND LEDA E. BARICHIO, ROMIE D. BARICHIO, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 149

EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. ELLIOTT, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 150

CHAS. G. ELLIOTT, JR., ANNA MARIE ELLIOTT, HENRY ELLIOTT, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 151

AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 152

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 153

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 154

MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. PROVOE, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF COUNSEL.

Mr. ANTHONY SAVAGE, 310 Federal Building, Seattle, Washington,

Solicitor for Appellant.

Mr. TOM DeWOLFE, 310 Federal Building, Seattle, Washington,

Solicitor for Appellant.

Mr. JOHN T. McCUTCHEON, 324 Federal Building, Tacoma, Washington,

Solicitor for Appellant.

Mr. JAMES T. RAHILY, Tacoma, Washington,

Associate Counsel.

Mr. STUART H. ELLIOTT, Tacoma, Washington,

Solicitor for Appellees.

Messrs. H. G. & DIX H. ROWLAND, Tacoma, Washington,

Solicitor for Appellees. [1]

In the United States District Court for the Western District of Washington, Southern Division.

No. 299-E.

HILARY HALBERT, Jr., DOROTHY HALBERT HUBBLE, and MILDRED HALBERT, a Minor, by HILARY HOUGHTON HALBERT, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court: Sitting in Equity:

The plaintiffs complain of the defendant and for cause of action allege and say:

I.

That the plaintiffs are and at all times since their birth have been, Indians and members of the Quinaielt Tribe of Indians and at present reside in Grays Harbor County, State of Washington, and that the said Hilary Houghton Halbert was duly and in accordance with law appointed guardian ad litem of the plaintiff Mildred Halbert by the above entitled court upon the ——day of December, 1925, and he duly qualified as guardian ad litem and is now acting as such upon the behalf of said minor child, one of the plaintiffs herein.

II.

That the father of said plaintiffs as herein named is an Indian duly enrolled and allotted upon the Quinaielt Indian Reservation and is the head of a family consisting of himself, his wife, and said plaintiffs. [2]

III.

That the said Hilary Halbert, Jr., Dorothy Halbert Hubble and Mildred Halbert are the children of Hilary Houghton Halbert, Quinaielt Indian allottee No. 639. That by reason of this fact and the facts herein set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation under respectively the same circumstances

and conditions these plaintiffs have a common interest in the subject matter of this action and are affected in a similar manner.

IV.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiffs are Indians and members of the Quinaielt tribe of Indians, and that their father is duly enrolled and allotted upon the Quinaielt Indian Reservation. That the plaintiffs herein are entitled under the Treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the allotting acts of the United States, to an allotment of at least 80 acres, each, of land upon the Quinaielt Indian reservation in the State of Washington and within this district. The jurisdiction of the court further depends upon the Acts of August 15, 1894 (28 Stat. L. 305) and is amended by the Act of February 6, 1901 (31 Stat. L. 760) giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

V.

That the father of said plaintiffs is allotted upon the Quinaielt Indian Reservation as No. 639; that said plaintiffs have the following named relatives allotted upon said reservation: their paternal grandmother, Lanie Ford Halbert, Quinaielt [3] allottee No. 638; their paternal uncle Fred P. Halbert, Quinaielt allottee No. 642; their paternal uncle Benjamin F. Halbert, Quinaielt allottee No. 641; their paternal uncle Sidney Seth Halbert, Quinaielt allottee No. 643; and their paternal uncle Ethan Ernest Halbert,

arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set [5] forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

X.

That said allotments selected by plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the law of the United States.

XI.

That notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patents therefor, and have denied and excluded, and still deny and exclude, plaintiffs herein from said land, and have refused and still refuse to let said plaintiffs go upon or reside upon said lands or any portion thereof.

XII.

That said plaintiffs are entitled to have said lands so selected allotted to them, and desire that the same be allotted to them, and that their rights be recognized and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XIII.

That the plaintiffs waive answer under oath.

WHEREFORE, plaintiffs pray judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly [6] certified by the Secretary of the Interior, and that the plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said lands as their homes, in all respects as provided by law.

2. That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for Plaintiffs.

State of Washington,
County of Grays Harbor,—ss.

HILARY HOUGHTON HALBERT being first duly sworn upon oath deposes and says: That he is one of the plaintiffs in the above entitled action, and is the father and guardian ad litem of Mildred Halbert, a minor, plaintiff herein; that he has read the foregoing Bill of Complaint, knows the contents thereof, and that the same is true as he verily believes.

HILLORY HOUGHTON HALBERT.

Subscribed and sworn to before me this 8th day of December, 1925.

[Notary Seal] CHARLES W. HODGDON,
Notary Public in and for the State of Washington,
residing at Hoquiam, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul 19, 1926.

ED M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [7]

United States District Court, Western District of Washington, Southern Division.

No. 299-E.

HILARY HALBERT, Jr., DOROTHY HALBERT HUBBLE, and MILDRED HALBERT, a Minor, by HILARY *HUGHTON* HALBERT, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiffs' bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiffs' bill of complaint, defendant denies that the plaintiffs are members of the Quinaielt Tribe of Indians; defendant admits each and every other material allegation contained therein.

II.

Referring to paragraph II defendant admits that the father of said plaintiffs herein named, is an Indian duly named and enrolled and allotted upon the Quinaielt Indian Reservation, and denies each and every other material allegation contained therein. [8]

III.

Referring to paragraph III defendant admits that said HILARY HALBERT JR., DOROTHY HALBERT HUBBLE, and MILDRED HALBERT, a Minor, are the children of Hilary Houghton Halbert, A Quinaielt Indian Allottee No. 639, and denies each and every other material allegation contained therein.

IV.

Referring to paragraph IV defendant admits the jurisdiction of the above entitled court, and denies each and every other material allegation contained therein.

V.

Referring to paragraph V defendant admits the same.

VI.

Referring to paragraph V*i* defendant admits that the father of the plaintiffs and the plaintiffs were

born and have lived in Gray's Harbor County, Washington, and denies each and every material allegation contained therein.

VII.

Referring to paragraph VII and VIII defendant admits the same.

VIII.

Referring to paragraph IX defendant denies each and every material allegation contained therein.

IX.

Referring to paragraph X defendant admits the same.

X.

Referring to paragraph XI defendant admits that he has refused to allot certain lands to the plaintiffs herein, but denies that said refusal was wrong. [9]

XI.

Referring to paragraph XII defendant denies the same.

WHEREFORE, having answered plaintiffs' bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVILLE,
United States Attorney.

DAVID SPAULDING,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Amended Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of Nov. 1927.

[Seal] ALINE ESLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 9, 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [10]

In the United States District Court for the Western District of Washington, Southern Division.

No. 299-E.

HILARY HALBERT, Jr., DOROTHY HALBERT HUBBLE, and MILDRED HALBERT, a Minor, by HILARY HOUGHTON HALBERT, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Hilary Halbert, Jr., Dorothy Halbert Hubble, and Mildred Halbert, a Minor, by Hilary Houghton Halbert, Guardian ad litem, appearing by their counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. Dist. Attorney, Seattle, Wash., John T. McCutchoon, Asst. U. S. Dist. Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Hilary Halbert, Jr., Dorothy Halbert Hubble and Mildred Halbert, a Minor, be and

they are hereby entitled to the lands heretofore selected by them situate upon the Quinaielt Indian Reservation, within this district [11] in Grays Harbor County, in the State of Washington, to-wit:

Hilary Halbert, Jr.,—N½ of NE¼, Sec. 8, Twp. 23, N. R., 11 W., W. M.

Dorothy Halbert (Hubble)—E½ of SE¼, Sec. 5, Twp. 23, N. R. 11 W., W. M.

Mildred Halbert—SE¼ of SW¼ and SW¼ of SE¼ Sec. 5 Twp. 23 N R 11 W. W. M.

as allotments to be held and owned by each of said plaintiffs respectively, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED and DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiffs, certificates of allotment of said lands heretofore described, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns, are not entitled to said lands as and for their allotments, with full right to use, build upon, clear, improve, and occupy the same, in all respects as provided by law, to all of which the defendant excepts and its exception is allowed.

Done in open court this 24th day of December, A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. L. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne. [12]

United States District Court, Western District of Washington, Southern Division.

No. 299-E

HILARY HALBERT, JR., et al,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Ruhily,

Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the land selected for allotment by the plaintiffs was subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such land allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the said plaintiffs, or to issue to [15] the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the land selected for their allotment, and that the plaintiffs are entitled to have said land allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said land.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same. [16]

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part

approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its *member*.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe in 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [17] member by the tribal

Indians of the Quinaielt Reservation were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotments to the plaintiffs herein when the evidence adduced at the time of trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March 1929.

STUART H. ELLIOTT,
and
H. G. & DIX ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Mar. 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [18]

United States District Court Western District of Washington, *Northern* Division.

No. 299-E.

HILARY HALBERT, JR., et al,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and Decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is hereby ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Received a copy of the within order this 20th day of March 1929.

STUART H. ELLIOTT
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [19]

In the United States District Court for the Western District of Washington, Southern Division.

No. 300-E.

RICH HALBERT, a Minor, by FRED F. HALBERT, Guardian ad litem,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court: Sitting in Equity:—

The plaintiff complains of the defendant and for cause of action alleges and says:

I.

That the plaintiff is and at all times since his birth has been an Indian and a member of the Quinaielt Tribe of Indians and at present resides with his father Fred P. Halbert in Grays Harbor County, State of Washington, and that the said Fred P. Halbert was duly and in accordance with law appointed guardian ad litem of the plaintiff by the above entitled court upon the —— day of December, 1925, and he duly qualified as guardian ad litem and is now acting as such upon the behalf of the minor child, plaintiff herein.

II.

That the father and guardian ad litem of said plaintiff as herein named is an Indian duly enrolled and allotted upon the Quinaielt Indian Reservation and is the head of a family consisting of himself, his wife, and said plaintiff, and have lived for many years and now live upon the Quinaielt Reservation within this District. [20]

III.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is an Indian and a member of the Quinaielt tribe of Indians, and that his father is duly enrolled and allotted upon the Quinaielt Indian Reservation. That the plaintiff herein is entitled under the Treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the allotting acts of the United States, to an allotment of at least 80 acres of land upon the Quin-

aielt Indian reservation in the State of Washington and within this district. The jurisdiction of the court further depends upon the Acts of August 15, 1894 (28 Stat. L. 305) and is amended by the Act of February 6, 1901 (31 Stat. L. 760) giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

IV.

That the father and guardian ad litem of said plaintiff is allotted upon the Quinaielt Indian Reservation as No. 642; that said plaintiff has the following named relatives allotted upon said reservation: his paternal grandmother Lanie Ford Halbert, Quinaielt allottee No. 638; his paternal uncle Benjamin F. Halbert, Quinaielt allottee No. 641; his paternal uncle Sidney Seth Halbert, Quinaielt allottee No. 643; his paternal uncle *Hillary* Houghton Halbert, Quinaielt allottee No. 639; and his paternal uncle Ethan Ernest Halbert, Quinaielt allottee No. 640; and other persons more distantly related to the plaintiff.

V.

That the father and guardian ad litem of the plaintiff, and the plaintiff, were born in Grays Harbor County, Washington, and have lived for many years, and now live, upon the Quinaielt Indian reservation in said county, within this district, and [21] have lived and associated and affiliated with the Quinaielt Indians during that entire period.

VI.

That on or about November 30, 1923, the father of plaintiff herein duly applied to the defendant for an allotment of land for his minor child, plaintiff herein, and with the assistance and approval of the defendant's agent, the superintendent of the Taholah Indian Agency, made the following selection of land for said minor child, plaintiff herein, towit:—

The south half of the northeast quarter of Section 8, Township 23 North, Range 11 West, W. M.

That later the Superintendent of the Taholah Indian Agency, the defendant's agent herein, returned the aforesaid selection for allotment to the father and guardian ad litem of the plaintiff herein and denied the said plaintiff the identical allotment of land or any selection or allotment of land upon the Quinaielt Indian reservation whatsoever.

VII.

That thereafter and about six months ago a Special Alloting agent was sent by the defendant, more particularly the Secretary of the Initerior, to the said Quinaielt Indian reservation for the purpose of alloting lands thereon to Indians entitled thereto, and the guardian ad litem of said plaintiff thereupon in due course and in accordance with law presented the above selection of land to the special alloting agent so that the same might be allowed to said minor child.

VIII.

That thereafter, plaintiff is informed and believes, said selection was regularly forwarded to the Secretary of the Interior at Washington, D. C. in accord-

ance with law, and each and [22] every step was regularly completed for the actual approval and granting of said allotment and the issuance of the necessary patent therefor except only the approval of the Secretary of the Interior. That subsequently the defendant, more particularly the Secretary of the Interior, neglected, refused and declined to allot to said plaintiff the identical allotment herein described, or any allotment of land upon the Quinaielt Reservation whatsoever, and the defendant by its officers and agents, more particularly the Commissioner of Indian Affairs, the Superintendent of the Quinaielt Indian Agency, and the Special Alloting Agent, returned said selection of allotment to the plaintiff denying him the right to an allotment upon said Quinaielt Indian reservation. That said denial and refusal of plaintiff's rights to an allotment was for no reason known to plaintiff, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiff as set forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

IX.

That said allotment selected by plaintiff herein is unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States.

X.

That notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents, have

wrongfully failed, neglected and refused to allot the said land to the plaintiff herein, or to issue to said plaintiff any trust or fee patent [23] therefor, and have denied and excluded, and still deny and exclude, plaintiff herein from said land and have refused and still refuse to let said plaintiff go upon or reside upon said land or any portion thereof.

XI.

That said plaintiff is entitled to have said land so selected allotted to him, and desires that the same be allotted to him, and that his rights be recognized and that he be permitted to go upon, live upon, cultivate and improve said land as his home.

XII.

That the plaintiff waives answer under oath.

WHEREFORE, plaintiff prays judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of this claimant to said 80 acre tract of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiff be awarded said land as his allotment and that he be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said land as his home, in all respects as provided by law.

2. That the plaintiff have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for plaintiff. [24]

State of Washington,
County of Grays Harbor,—ss.

FRED P. HALBERT being first duly sworn upon oath deposes and says: That he is the father and the guardian ad litem of the plaintiff in the above entitled action; that he has read the foregoing Bill of Complaint, knows the contents thereof, and that the same is true as he verily believes.

FRED P. HALBERT.

Subscribed and sworn to before me this 12 day of December, 1925.

[Notary Seal] CHAS. THOMAS,
Notary Public in and for the State of Washington, residing at *Quinault*.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul 19, 1926.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [25]

United States District Court, Western District of Washington, Southern Division.

No. 300-E.

RICH HALBERT, a Minor, by FRED P. HALBERT, Guardian ad litem,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiff's bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiff's bill of complaint, defendant denies that plaintiffs are members of the Quinaielt Tribe of Indians and admits each and every other material allegation contained therein.

II.

Referring to paragraph II defendant admits that the father and guardian ad litem of said plaintiff is an Indian duly enrolled and allotted upon the Quinaielt Indian Reservation; and defendant denies each and every other material allegation contained therein.

III.

Referring to paragraph III defendant admits the jurisdiction of the above entitled court and denies

each and every other material allegation contained therein. [26]

IV.

Referring to paragraph IV. defendant admits the same.

V.

Referring to paragraph V defendant admits that the plaintiff was born in Gray's Harbor County Washington and denies each and every other material allegation contained therein.

VI.

Referring to paragraph VI and VII defendant admits the same.

VII.

Referring to paragraph VIII defendant admits that it has refused to allot land upon the Quinaielt Reservation to the plaintiff herein and denies each and every other material allegation contained therein.

VIII.

Referring to paragraph IX, defendant admits the same.

IX.

Referring to paragraph X, defendant admits that it has refused to allot lands to the plaintiff herein but denies that said refusal was wrongful.

XI.

Referring to paragraph XI defendant denies the same.

WHEREFORE, having answered plaintiffs' bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney. [27]

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Amended Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of November, 1927.

[Seal] S. E. LEITCH,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 11, 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [28]

In the United States District Court for the Western District of Washington, Southern Division.

No. 300-E.

RICH HALBERT, a Minor, by FRED P. HALBERT, Guardian ad litem,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiff Rich Halbert, a minor, by Fred P. Halbert, Guardian ad litem, appearing by his counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst U. S. District Attorney, Tacoma, Jamet T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiff Rich Halbert, a minor, be and he is hereby entitled to the land heretofore selected by him situate upon the *Quianielt* Indian Reservation within this District, in Grays Harbor County, in the State of Washington, to-wit:

The east half of the northeast quarter of Section Nine (9), Township Twenty-three (23) North, Range Eleven (11) West, Willamette Meridian. [29]

as an allotment to be held and owned by said plaintiff in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiff, certificate of allotment of said lands heretofore described, said certificate of allotment to be in effect and to award to said plaintiff all of the rights to which said plaintiff is entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiff, his heirs, executors, administrators and assigns, are not entitled to said lands as and for their allotments, with full right to use, build upon, clear, improve, and occupy the same, in all respects as provided by law, to all of which defendant excepts and its exception is allowed.

Done in open court this 24th day of December, A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [30]

United States District Court, Western District of Washington, Southern Division.

No. 300-E.

RICH HALBERT, etc.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Wash-

ington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the land selected for allotment by the plaintiff was subject to selection and allotment under the laws of the United States, and that the plaintiff is lawfully entitled to have such land allotted to him.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the said plaintiff, or to issue to the plaintiff any trust or fee patent therefor. [33]

III.

That the District Court erred in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff is entitled to the land selected for his allotment, and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his rights to possession of said land and his rights to improve the same, and estopping the defendant from

hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve, and build upon said land.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same. [34]

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that

time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiff and his parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe in 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiff who was born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [34A] member of the tribal Indians of the Quinaielt Reservation was entitled to allotment thereon.

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotments

to the plaintiff herein when the evidence adduced at the time of trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiff, certificate of allotment of the land claimed to be selected by said plaintiff.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March, 1929.

STUART H. ELLIOTT
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar 20 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [35]

United States District Court, Western District of Washington, Southern Division.

No. 300-E.

RICHARD HALBERT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein, it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March 1929.

STUART H. ELLIOTT,
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar. 20, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [36]

In the United States District Court for the Western District of Washington, Southern Division.

No. 301-E.

VERNON SIDNEY HALBERT, a Minor, by BENJAMIN F. HALBERT, Guardian ad litem,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court: Sitting in Equity:

The plaintiff complains of the defendant and for cause of action alleges and says:—

I.

That the plaintiff is and at all times since his birth has been an Indian and a member of the Quinaielt Tribe of Indians and at present resides with his father Benjamin F. Halbert in Grays Har-

bor County, State of Washington, and that the said Benjamin F. Halbert was duly and in accordance with law appointed guardian ad litem of the plaintiff by the above entitled court upon the —— day of December, 1925, and he duly qualified as guardian ad litem and is now acting as such upon the behalf of the minor child, plaintiff herein.

II.

That the father and guardian ad litem of said plaintiff as herein named is an Indian duly enrolled and allotted upon the Quinaielt Indian Reservation and is the head of a family consisting of himself, his wife, and said plaintiff. [37]

III.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is an Indian and a member of the Quinaielt tribe of Indians, and that his father is duly enrolled and allotted upon the Quinaielt Indian Reservation. That the plaintiff herein is entitled under the Treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the allotting acts of the United States, to an allotment of at least 80 acres of land upon the Quinaielt Indian reservation in the State of Washington and within this district. The jurisdiction of the court further depends upon the Acts of August 15, 1894 (28 Stat. L. 305) and is amended by the Act of February 6, 1901 (31 Stat. L. 760) giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

IV.

That the father and guardian ad litem of said plaintiff is allotted upon the Quinaielt Indian Reservation as No. 641; that said plaintiff has the following named relatives allotted upon said reservation: his paternal grandmother Lanie Ford Halbert, Quinaielt allottee No. 638; his paternal uncle Fred P. Halbert, Quinaielt allottee No. 642; his paternal uncle Sidney Seth Halbert, Quinaielt *allotee* No. 643; his paternal uncle *Hillary* Houghton Halbert, Quinaielt allottee No. 639; and his paternal uncle Ethan Ernest Halbert, Quinaielt allottee No. 640; and other persons more distantly related to the plaintiff.

V.

That the father and guardian ad litem of the plaintiff, and the plaintiff, were born and have lived all their lives, and now live, in Grays Harbor County, Washington, within this District, and have lived and associated and affiliated with the [38] Quinaielt Indians during that entire period.

VI.

That on or about November 30, 1923, the father of plaintiff herein duly applied to the defendant for an allotment of land for his minor child, plaintiff herein, and with the assistance and approval of the defendant's agent, the superintendent of the Taholah Indian Agency, made the following selection of land for said minor child, plaintiff herein, towit:—

The north half of the southwest quarter of Section 5, Township 23 North, Range 11 West, W. M.

That later the Superintendent of the Taholah Indian Agency, the defendant's agent herein, returned the aforesaid selection for allotment to the father and guardian ad litem of the plaintiff herein and denied the said plaintiff the identical allotment of land or any selection or allotment of land upon the Quinaielt Indian reservation whatsoever.

VII.

That thereafter and about six months ago a Special Alloting agent was sent by the defendant, more particularly the Secretary of the Interior, to the said Quinaielt Indian reservation for the purpose of alloting lands thereon to Indians entitled thereto, and the guardian ad litem of said plaintiff thereupon in due course and in accordance with law presented the above selection of land to the special alloting agent so that the same might be allotted to said minor child.

VIII.

That thereafter, plaintiff is informed and believes, said selection was regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval and [39] granting of said allotment and the issuance of the necessary patent therefor except only the approval of the Secretary of the Interior. That subsequently the defendant, more particularly the Secretary of the Interior, neglected, refused and declined to allot to said plaintiff the identical allotment herein described, or any allotment of land upon the Quin-

aielt Reservation whatsoever, and the defendant by its officers and agents, more particularly the Commissioner of Indian Affairs, the Superintendent of the Quinaielt Indian Agency, and the Special Alloting Agent, returned said selection of allotment to the plaintiff denying him the right to an allotment upon said Quinaielt Indian Reservation. That said denial and refusal of plaintiff's rights to an allotment was for no reason known to plaintiff, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiff as set forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

IX.

That said allotment selected by plaintiff herein is unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the law of the United States.

X.

That notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said land to the plaintiff herein, or to issue to said plaintiff any trust or [40] fee patent therefor, and have denied and excluded, and still deny and exclude, plaintiff herein from said land and have refused and still refuse to let said plaintiff go upon or reside upon said land or any portion thereof.

XI.

That said plaintiff is entitled to have said land so selected allotted to him, and desires that the same be allotted to him, and that his rights be recognized and that he be permitted to go upon, live upon, cultivate and improve said land as his home.

XII.

That the plaintiff waives answer under oath.

WHEREFORE, plaintiff prays judgment as follows:—

1. That a judgment and decree be entered herein as provided by law in favor of this claimant to said 80 acre tract of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiff be awarded said land as his allotment and that he be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said land as his home, in all respects as provided by law.

2. That the plaintiff have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for plaintiff. [41]

State of Washington,
County of Grays Harbor,—ss.

BENJAMIN F. HALBERT being first duly sworn upon oath deposes and says: That he is the father and the guardian ad litem of the plaintiff in the above entitled action; that he has read the fore-

going Bill of Complaint, knows the contents thereof, and that the same is true as he verily believes.

BENJAMIN F. HALBERT.

Subscribed and sworn to before me this 5th day of December, 1925.

[Notary Seal] JOHN D. EHRHART,
Notary Public in and for the State of Washington, residing at Hoquiam.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul 19, 1926.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [42]

United States District Court, Western District of Washington, Southern Division.

No. 301-E.

VERNON SIDNEY HALBERT, a Minor, by BENJAMIN F. HALBERT, Guardian ad litem,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiff's

bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of the plaintiff's bill of complaint, defendant denies that plaintiff is a member of the Quinaielt Tribe of Indians, and admits each and every other material allegation contained therein.

II.

Referring to paragraph II defendant admits that the father and guardian ad litem of said plaintiff is duly enrolled and allotted upon the Quinaielt Reservation, and denies each and every other material allegation contained therein.

III.

Referring to paragraph III defendant admits the jurisdiction of the above entitled court and denies each and every other material allegation contained therein.

IV.

Referring to paragraph IV defendant admits the same. [43]

V.

Referring to paragraph V defendant admits that the plaintiff was born in *Gray's* Harbor County, Washington, and denies each and every other material allegation contained therein.

VI.

Referring to paragraph VI the defendant admits the same.

VII.

Referring to paragraph VIII defendant admits that it has refused to allot land to said plaintiff and denies each and every other material allegation contained therein.

VIII.

Referring to paragraph IX defendant admits the same.

IX.

Referring to paragraph X defendant admits that it has refused to allot lands to the plaintiff, but denies that said refusal was wrongful.

X.

Referring to paragraph XI defendant denies the same.

WHEREFORE, having answered plaintiff's bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS P. REVELLE,
United States Attorney,

DAVID L. SPAULDING,
Assistant United States Attorney. [44]

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on

behalf of the United States of America, defendant herein; that he has read the foregoing amended Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 10th day of November, 1927.

[Seal] S. M. H. COOK,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 11, 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [45]

In the United States District Court for the Western District of Washington, Southern Division.

No. 301-E.

VERNON SIDNEY HALBERT, a Minor, by BENJAMIN F. HALBERT, Guardian ad litem,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiff Vernon Sidney Halbert, a Minor, by Ben-

jamin F. Halbert, Guardian ad litem, appearing by his counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. Dist. Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. Dist. Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED; That plaintiff Vernon Sidney Halbert, a minor, be and he is hereby entitled to the lands heretofore selected by him situate upon the Quinaielt Indian Reservation within this District, in Grays Harbor County, in the State of Washington, to-wit: The north half of the southwest quarter of Section 5, Township 23 North, Range 11 West, W. M. [46] as an allotment to be held and owned by said plaintiff in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiff, certificate of allotment of said lands heretofore described, said certificate of allotment to be in effect and to award to said plaintiff all of the rights to which said plaintiff is entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED

AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiff, his heirs, executors, administrators and assigns, are not entitled to said lands as and for their allotments, with full right to use, build upon, clear, improve, and occupy the same, in all respects as provided by law, to all of which defendant excepts and its exception is allowed.

DONE in open court this 24th day of December A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1928.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [47]

United States District Court, Western District of Washington, Southern Division.

No. 301-E

VERNON SIDNEY HALBERT, etc.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Errors upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court.

I.

That the District Court erred in holding and finding that the land selected for allotment by the plaintiff was subject to selection and allotment under the laws of the United States, and that the plaintiff is lawfully entitled to have such land allotted to him.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the said plaintiff, or to issue to the plaintiff any trust or fee patent therefor. [50].

III.

That the District Court erred in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff is entitled to the land selected for his allotment, and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiff in his right to possession of said land and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve, and build upon said land.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same.

VII.

That the District Court erred in holding and finding that the decision and action of the Indian [51] Council of 99.2 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiff and his parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe in 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiff who was born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [52] member of the tribal Indians of the Quinaielt Reservation was entitled to allotment thereon.

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotments to the plaintiff herein when the evidence adduced at the time of trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiff, certificate of allot-

ment of the land claimed to be selected by said plaintiff.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Asst. United States Attorney.

TOM DeWOLFE,
Asst. United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of Mar 1929.

STUART H. ELLIOTT,
and
STUART H. ELLIOTT,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar. 20, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [53]

United States District Court, Western District of Washington, Southern Division.

No. 301-E

VERNON SIDNEY HALBERT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL

ON THE Application of the defendant herein it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further Ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Received a copy of the within Order this 20th day of Mar., 1929.

STUART H. ELLIOTT,
and H. G. and
DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar. 20, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [54]

In the United States District Court for the Western District of Washington, Southern Division.

No. 302-E

SIDNEY E. HALBERT, a Minor, by SIDNEY SETH HALBERT, Guardian ad litem,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court: Sitting in Equity:

The plaintiff complains of the defendant and for cause of action alleges and says:

I.

That the plaintiff is and at all times since his birth has been an Indian and a member of the Quinaielt Tribe of Indians and at present resides with his father Sidney Sethe Halbert in Grays Harbor County, State of Washington, and that the said Sidney Seth

Halbert was duly and in accordance with law appointed guardian ad litem of the plaintiff by the above entitled court upon the — day of December, 1925, and he duly qualified as guardian ad litem and is now acting as such upon the behalf of the minor child, plaintiff herein.

II.

That the father and guardian ad litem of said plaintiff as herein named is an Indian duly enrolled and allotted upon the Quinaielt Indian Reservation and is the head of a family consisting of himself, his wife, and said plaintiff. [55]

III.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is an Indian and a member of the Quinaielt tribe of Indians, and that his father is duly enrolled and allotted upon the Quinaielt Indian Reservation. That the plaintiff herein is entitled under the Treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the alloting acts of the United States, to an allotment of at least 80 acres of land upon the Quinaielt Indian reservation in the State of Washington and within this district. The jurisdiction of the court further depends upon the Acts of August 15, 1894 (28 Stat. L. 305) and is amended by the Act of February 6, 1901 (31 Stat. L. 760) giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

IV.

That the father and guardian ad litem of said plaintiff is allotted upon the Quinaielt Indian Reservation as No. 643; That said plaintiff has the following named relatives allotted upon said reservation: his paternal grandmother, Lanie Ford Halbert, Quinaielt allottee No. 638; his paternal uncle Fred P. Halbert, Quinaielt allottee No. 642; his paternal uncle Benjamin F. Halbert, Quinaielt allottee No. 641; his paternal uncle Hillary Houghton Halbert, Quinaielt allottee No. 639; and his paternal uncle Ethan Ernest Halbert, Quinaielt allottee No. 640; and other persons more distantly related to the plaintiff.

V.

That the father and guardian ad litem of the plaintiff, and the plaintiff, were born and have lived all their lives and now live in Grays Harbor County, Washington, within this District, and have lived and associated and affiliated with the Quinaielt Indians during that entire period. [56]

VI.

That on or about December 1, 1923, the father of plaintiff herein duly applied to the defendant for an allotment of land for his minor child, plaintiff herein, and with the assistance and approval of the defendant's agent, the superintendent of the Taholah Indian Agency, made the following selection of land for said minor child, plaintiff herein, towit:

Lot 5, and the southwest quarter of the northwest quarter of Sec. 5, Twp. 23, North, Range 11 West, W. M.

That later the Superintendent of the Tahoiah Indian Agency, the defendant's agent herein, returned the aforesaid selection for allotment to the father and guardian ad litem of the plaintiff herein and denied the said plaintiff the identical allotment of land or any selection or allotment of land upon the Quinaielt Indian reservation whatsoever.

VII.

That thereafter and about six months ago a Special Alloting agent was sent by the defendant, more particularly the Secretary of the Interior, to the said Quinaielt Indian reservation for the purpose of alloting lands thereon to Indians entitled thereto, and the guardian ad litem of said plaintiff thereupon in due course and in accordance with law presented the above selection of land to the special alloting agent so that the same might be allotted to said minor child.

VIII.

That thereafter, plaintiff is informed and believes, said selection was regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval and [57] granting of said allotment and the issuance of the necessary patent therefor except only the approval of the Secretary of the Interior. That subsequently the defendant, more particularly the Secretary of the Interior, neglected, refused and declined to allot to said plaintiff the identical allotment herein described, or any allotment of land upon the Quinaielt Reservation whatsoever, and the defendant by its officers and

agents, more particularly the Commissioner of Indian Affairs, the Superintendent of the Quinaielt Indian Agency, and the Special Alloting Agent, returned said selection of allotment to the plaintiff denying him the right to an allotment upon said Quinaielt Indian Reservation. That said denial and refusal of plaintiff's rights to an allotment was for no reason known to plaintiff, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiff as set forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

IX.

That said allotment selected by plaintiff herein is unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the law of the United States.

X.

That notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said land to the plaintiff herein, or to issue to said plaintiff any trust or fee patent [58] therefor, and have denied and excluded, and still deny and exclude, plaintiff herein from said land and have refused and still refuse to let said plaintiff go upon or reside upon said land or any portion thereof.

XI.

That said plaintiff is entitled to have said land so selected allotted to him, and desires that the same be allotted to him, and that his rights be recognized and that he be permitted to go upon, live upon, cultivate and improve said land as his home.

XII.

That the plaintiff waives answer under oath.

WHEREFORE, plaintiff prays judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of this claimant to said 80 acre tract of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiff be awarded said land as his allotment and that he be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said land as his home, in all respects as provided by law.

2. That the plaintiff have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for Plaintiff. [59]

State of Washington,
County of *Garys* Harbor—*ss.*

SIDNEY SETH HALBERT being first duly sworn upon oath deposes and says: That he is the father and the guardian ad litem of the plaintiff in the above entitled action; that he has read the fore-

going Bill of Complaint, knows the contents thereof, and that the same is true as he verily believes.

SIDNEY SETH HALBERT.

Subscribed and sworn to before me this 18 day of December, 1925.

[Notary Seal] CHAS. E. KUHN,
Notary Public in and for the State of Washington, residing, at Hoquiam.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul 19, 1926.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [60]

United States District Court, Western District of Washington, Southern Division.

No. 302-E.

SIDNEY E. HALBERT, a Minor, by SIDNEY SETH HALBERT, Guardian ad litem,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiff's bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiff's bill of complaint, defendant denies that plaintiff is a member of the Quinaielt Tribe of Indians, and admits each and every other material allegation contained therein.

II.

Referring to paragraph II defendant admits that the father and guardian ad litem of said plaintiff is duly enrolled and allotted upon the Quinaielt Reservation, and denies each and every other material allegation contained therein.

III.

Referring to paragraph III defendant admits the jurisdiction of the above entitled court and denies each and every other material allegation contained therein.

IV.

Referring to paragraph IV defendant admits the same. [61]

V.

Referring to paragraph V defendant admits that the plaintiff was born in Gray's Harbor County, Washington, and denies each and every other material allegation contained therein.

VI.

Referring to paragraph VI the defendant admits the same.

VII.

Referring to paragraph VIII defendant admits that it has refused to allot land to said plaintiff and denies

each and every other material allegation contained therein.

VIII.

Referring to paragraph IX defendant admits the same.

IX.

Referring to paragraph X defendant admits that it has refused to allot lands to the plaintiff, but denies that said refusal was wrongful.

X.

Referring to paragraph XI defendant denies the same.

WHEREFORE, having answered plaintiff's bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney [62]

United States of America,
Western District of Washington,
Southern Division—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing amended An-

swer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 10th day of November, 1927.

[Seal] ALINE ESLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 11, 1927.

ED. M. LAKIN,
Clerk.

By E. R.,
Deputy. [63]

In the United States District Court for the Western District of Washington, Southern Division.

No. 302 E.

SIDNEY E. HALBERT, a Minor, by SIDNEY SETH HALBERT, Guardian ad litem,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiff Sidney E. Halbert, a minor, by Sidney Seth Halbert, Guardian ad litem, appearing by his counsel Stuart H. Elliott, and H. G. & Dix H. Rowland,

and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiff Sidney E. Halbert, a Minor, be and he is hereby entitled to the lands heretofore selected by him situate upon the Quinaielt Indian Reservation within this District, *in* Grays Harbor County, in the State of Washington, to-wit:

> Lot 5, and the southwest quarter of the northwest quarter of Section Five (5), Township Twenty-three (23) North, Range Eleven (11) West, of the Willamette Meridian, in the State of Washington. [64]

as an allotment to be held and owned by said plaintiff in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiff, certificate of allotment of said lands heretofore described, said certificate of allotment to be in effect and to award to said plaintiff all of the rights to which said plaintiff is entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiff, his heirs, executors, administrators and assigns, are not entitled to said lands as and for their allotments, with full right to use, build upon, clear, improve, and occupy the same, in all respects as provided by law, to all of which the defendant excepts and its exception is allowed.

DONE in open court this 24th day of December A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec 24 1928

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [65]

United States District Court, Western District of Washington, Southern Division.

No. 302-E

SIDNEY E. HALBERT, etc.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ASSIGNMENTS OF ERRORS.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Errors upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the land selected for allotment by the plaintiff was subject to selection and allotment under the laws of the United States, and that the plaintiff is lawfully entitled to have such land allotted to him.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the said plaintiff, or to issue to the [68] plaintiff any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff is entitled to the land selected for his allotment, and that the plaintiff is entitled to have said land alloted to him by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiff in his right to possession of said land and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve, and build upon said land.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made

under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same.

VII.

That the District Court erred in holding [69] and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That *theDistrict* Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiff and his parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiff who was born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [70] member of the tribal Indians of the Quinaielt Reservation was entitled to allotment thereon.

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotment to the plaintiff herein when the evidence adduced at the time of trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiff, certificate of

allotment of the land claimed to be selected by said plaintiff.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March 1929.

STUART H. ELLIOTT
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [71]

United States District Court, Western District of Washington, Southern Division.

No. 302-E

SIDNEY E. HALBERT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of Mar 1929.

STUART H. ELLIOTT
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [72]

In the United States District Court for the Western District of Washington, Southern Division.

No. 306 E

ARCHIE PELLARD,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court: Sitting in Equity:—

The plaintiff complains of the defendant and for cause of action alleges and says:—

I.

That the plaintiff is and at all times since his birth has been a person of part Indian blood, over the age of 21 years, being a member of the Quinaielt tribe of Western Washington, and at present resides in Wahkiakum County, State of Washington, in this District.

II.

That the plaintiff, as before stated, is a Quinaielt Indian and has been all of his life recognized as a member of said Quinaielt tribe, and that at all times mentioned herein has associated and affiliated with the Quinaielt and affiliated and associated bands and tribes of fish-eating Indians of Western Washington living along the Pacific Coast, and for the past fourteen years has lived the greater portion of the time upon the Quinaielt Indian Reservation in Grays Harbor County, Washington, within this District. [73]

III.

That the defendant has recognized other members of the plaintiff's immediate family as Quinaielt Indians and has allotted said members of his family upon the Quinaielt Indian Reservation, among whom are his full blood sister Adeline James Lohre, Quinaielt allottee No. 529, a niece Sophia Millett Yerkes, Quinaielt allottee No. 501, and the following named nieces: Ellen Baker, Daisy Borg, Cora Walters John, France James Payne, Eleanor James Chenois, and Maria James Ross, and the following named grandnieces and nephews: Chester Millett, Arthur Yerkes, Secar Yerkes, Harry Baker and Fred Baker. That plaintiff has other and more distant relatives allotted upon said Quinaielt Indian Reservation.

IV.

That plaintiff is a widower, his deceased wife being named Nina Banchio. That the said Nina Banchio was a recognized member of the Quinaielt Indian tribe and numerous members of her family are

recognized members of the Quinaielt tribe and are allotted land upon the Quinaielt Indian Reservation.

V.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is an Indian and a member of the Quinaielt Tribe of Indians, and is entitled under the treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the alloting acts of the United States, to an allotment of at least 80 acres of land upon the Quinaielt Indian Reservation in the State of Washington and within this district. The jurisdiction of the Court further depends upon the Acts of August 15, 1894, (28 Stat. L. 305) as is amended by the Act of February 6, 1901, [74] (31 Stat. L. 760), giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about fourteen years ago said defendant, through its officers and agents, more particularly a special allotting agent and the Agent of the Quinaielt Indian Reservation, was engaged in allotting land upon the Quinaielt Indian Reservation to Indians entitled thereto, and at this time said plaintiff presented himself to said superintendent and special allotting agent, made a selection and requested that he be allotted 80 acres of land upon said Quinaielt Indian reservation, whereupon the defendant, more particularly said special allotting agent, received and accepted said selection of land and as fully as could be done said allot-

ments was set aside by the defendants, its officers and agents, to your plaintiff herein. That later plaintiff was informed by the defendant, its officers and agents, that the remaining land embraced in the Quinaielt Indian Reservation was then classified as timber land the same not being classified as agricultural or grazing land, said selection could not be allowed or allotted said plaintiff at that time, denying plaintiff the right to go upon the land so selected, clear the same and make a home thereon.

That thereafter and upon numerous occasions plaintiff applied to defendant, its officers and agents, for an allotment of land upon said reservation and requested permission to go upon the same and make a home thereon, and was each time denied said allotment, for the reason that the defendant, its officers and agents believed and stated that the remaining land embraced in said reservation was timber land and as such was not allotable [75] to individual Indians under the laws of the United States.

VII.

That thereafter and about a year and a half ago, a special allotting agent was sent by the defendant, more particularly the Secretary of the Interior, to said Quinaielt Indian reservation, for the purpose of allotting all of the remaining unallotted land on said reservation to Indians entitled thereto, and the said plaintiff thereupon in due course and in accordance with law, regularly proceeded to make a selection for an allotment of land on said Quinaielt Indian Reservation, which allotment is described in words and figures as follows, towit:—

The West half of the Northwest quarter of Section 21, Township 22 North of Range 12 West, W. M., containing 80 acres.

VIII.

That thereafter, plaintiff is informed and believes, said selection was regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval and granting of said allotment and the issuance of the necessary patent therefor except only the approval of the Secretary of the Interior. That on or about the 14th day of October, 1926, the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected, refused and declined to allot to said plaintiff the identical allotment herein described, or any allotment of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of plaintiff's right to allotment was for no reason known to plaintiff, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said [76] plaintiff as set forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

IX.

That said allotment selected by plaintiff herein is unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selec-

tion and allotment under the laws of the United States.

X.

That notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said land to the plaintiff herein, or to issue to said plaintiff any trust or fee patent therefor, and have denied and excluded, and still deny and exclude, plaintiff herein from said land and have refused and still refuse to let said plaintiff go upon or reside upon said land or any portion thereof.

XI.

That the said plaintiff is entitled to have said land so selected by him allotted to him, and desires that the same be allotted to him and that his rights be recognized and that he be permitted to go upon, live upon, cultivate and improve said land as his home.

XII.

That plaintiff waives answer under oath.

WHEREFORE, plaintiff prays judgment as follows:—

1. That a judgment and decree be entered herein as provided by law in favor of this claimant to said 80 acre tract of [77] land hereinbefore described and that said decree be properly certified by the Secretary of the Interior, and that the plaintiff be awarded said land as his allotment and that he be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said land as his home, in all respects as provided by law.

2. That the plaintiff have all other and further relief as is equitable and just.

STUART H. ELLIOTT
H. G. & DIX H. ROWLAND,
Attorneys for Plaintiff.
302 Equitable Building,
Tacoma, Washington.

State of Washington,
County of Wahkiakum,—ss.

ARCHIE PELLARD being first duly sworn on oath deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Bill of Complaint, knows the contents thereof and that the same is true as he verily believes.

ARCHIE PELLARD

Subscribed and sworn to before me this 11th day of November, 1926.

[Notary Seal] N. W. TALLANT
Notary Public in and for the State of Washington, residing at Brookfield, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov 24, 1926

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [78]

United States District Court, Western District of Washington, Southern Division.

No. 306 E

ARCHIE PELLARD,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiff's bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiff's bill of complaint, defendant admits that plaintiff is a person of part Indian blood; defendant denies each and every other material allegation therein contained.

II.

Referring to paragraph II, defendant denies each and every material allegation therein contained.

III.

Referring to paragraphs III, IV and V of plaintiff's bill of complaint, defendant admits every material allegation therein contained.

IV.

Referring to paragraph VI, defendant denies each and every material allegation therein contained. [79]

V.

Referring to paragraph VII, defendant admits that a Special Allotting Agent was sent to the Quinaielt Indian Reservation for the purpose of allotting lands upon said Reservation to Indians entitled thereto; defendant denies each and every other allegation therein contained.

VI.

Referring to paragraph VIII, defendant denies each and every material allegation therein contained.

VII.

Referring to paragraph IX, defendant admits that the land described in paragraph VII of plaintiff's bill of complaint is surveyed, unallotted, unimproved, vacant Indian land.

VIII.

Referring to paragraph X, defendant admits that it has refused to allot said land to the plaintiff herein, but denies that said refusal was wrongful.

IX.

Referring to paragraph XI, defendant denies each and every material allegation therein contained.

WHEREFORE, having answered plaintiff's bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs.

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney. [80]

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Amended Answer, knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

SUBSCRIBED and sworn to before me this 5th day of November, 1927.

[Seal] ALINE ESLER,

Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov 9, 1927

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [81]

In the United States District Court for the Western District of Washington, Southern Division

No. 306 E

ARCHIE PELLARD,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiff, Archie Pellard appearing by his counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiff, Archie Pellard be and he is hereby entitled to the lands heretofore selected by him situate upon the Quinaielt Indian Reservation, within this District, in Grays Harbor County, in the State of Washington, to-wit:

The West half of the Northwest quarter of Section 21, Township 22 North of Range 12 West, W. M., containing 80 acres.

as an allotment to be held and owned by said plaintiff, in all [82] respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED That the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiff certificates of allotment of said land heretofore described, said certificate of allotment to be in effect and to award to said plaintiff all of the rights to which said plaintiff is entitled under and by virtue of the laws of the United States.

IT *IF* FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiff, his heirs, executors, administrators and assigns, are not entitled to said land as and for their allotment, with full right to use, build upon, clear, improve, and occupy the same, in all respects as provided by law; to all of which the defendant excepts and its exception is allowed.

Done in open court this 24th day of December A. D. 1928.

EDWARD E. CUSHMAN
Judge.

[Endorsed]: O. K. as to form

D. SPAULDING
(Asst. U. S. Attorney)

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division Dec 24 1928

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [83]

United States District Court, Western District of Washington, Southern Division.

No. 306-E

ARCHIE PELLARD,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERRORS.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Errors upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant

seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the land selected for allotment by the plaintiff was subject to selection and allotment under the laws of the United States, and that the plaintiff is lawfully entitled to have such land allotted to him.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the said plaintiff, or to issue to the [86] plaintiff any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff is entitled to the land selected for his allotment, and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiff in his right to possession of said land and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is

not entitled to go upon, clear, improve, and build upon said land.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same. [87]

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that

the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiff and his parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiff who was born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [87 A] member of the tribal Indians of the Quinaielt Reservation was entitled to allotment thereon.

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotment to the plaintiff herein when the evidence adduced at the time of trial herein was insufficient to sustain said de-

cree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiff, certificate of allotment of the land claimed to be selected by said plaintiff.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March, 1929.

STUART H. ELLIOTT
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, March 20, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [88]

United States District Court, Western District of Washington, *Northern* Division.

No. 306 E

ARCHIE PELLARD,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On application of the defendant herein it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March, 1929.

STUART H. ELLIOTT
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [89]

In the United States District Court for the Western District of Washington, Southern Division.

No. 307 E

ROSE PEERS PICKERNOLL, and MABLE PEERS WHITE, and AMELIA PEERS ALDEN,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the above entitled Court: Sitting in Equity:

The plaintiffs complain of the defendant and for cause of action allege and says:

I.

That the plaintiffs are and at all times herein set forth have been persons of part Indian blood, over the age of twenty-one years, and members of the Quinaielt tribe of Indians, and reside in the State of Washington within this District.

II.

That the father of the plaintiffs was named Henry Peers and that he is now deceased. That the said Henry Peers was an Indian, being a member of an associated and affiliated band of Indians of the Quinaielt Indian tribe, and a fish-eating Indian of the Pacific Coast in Western Washington. That the mother of these plaintiffs was named Judith Ducheney, who died long ago, and that she was an Indian and a recognized member of the Quinaielt tribe of Indians.

III.

That the defendant has recognized many members of plaintiffs' family as belonging to the Quinaielt Indian tribe and plaintiffs have the following members of their family allotted [90] upon the Quinaielt Indian Reservation, towit: A paternal aunt, Adeline James Lohre, and seven children of the said Adeline James Lohre. A maternal aunt, Agnes Elliott, and nine children of the said Agnes Elliott. That said plaintiffs have numerous other relatives allotted upon the Quinaielt Indian Reservation. That the said plaintiffs Amelia Peers Alden and Rose Peers Pickernoll were born, reared, and now live, in Pacific County, Washington, and the plaintiff Mabel Peers White was born and reared in Wahkiakum County, Washington, within this District.

IV.

That the plaintiffs as above set forth are full blood sisters and that by reason of this fact and the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation, under respectively the same conditions

and like circumstances, these plaintiffs have a common interest in the subject matter of this action and are affected in a similar manner.

V.

That the grounds upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the allotting acts of the United States, to an allotment of at least 80 acres, each, of land upon the Quinaielt Indian Reservation in the State of Washington and within this district. The jurisdiction of the Court further depends upon the Acts of [91] August 15, 1894, (28 Stat. L. 305) as amended by the Act of February 6, 1901, (31 Stat. L. 760); giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about a year and a half ago a Special Allotting Agent was sent by the defendant, more particularly the Secretary of the Interior, to the said Quinaielt Indian Reservation for the purpose of allotting land upon said reservation to Indians entitled thereto, and said plaintiffs in due course and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Indian Reservation, which allotments are described in words and figures as follows, towit:

Amelia Peers Alden—W½ of SE¼, Sec. 16, T. 22 N., R. 12 W., W.M.

Rose Peers Pickernoll—E½ of SE¼, Sec. 16, T. 22 N., R. 12 W., W.M.

Mable Peers White—E½ of NE¼, Sec. 16, T. 22 N., R. 12, W., W.M.

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval and granting of said allotments and the issuance of the necessary patents therefor except only the approval of the Secretary of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected, refused and declined to allot to said plaintiffs the identical allotments herein described or any allotments of land upon the Quinaielt Reservation whatsoever. That said denial and refusal [92] of plaintiffs' rights to allotments was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and *cultivated*, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all of the facts hereinbefore alleged, the defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude, plaintiffs herein from said land and have refused and still refuse to let said plaintiffs go upon or reside upon said lands or any portion thereof.

X.

That the said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them and that their rights be recognized and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath. [93]

WHEREFORE, plaintiffs pray judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said lands as their homes, in all respects as provided by law.

2. That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for plaintiffs.
302 Equitable Building,
Tacoma, Washington.

State of Washington,
County of Pacific,—ss.

ROSE PEERS PICKERNOLL being first duly sworn on oath deposes and says: That she is one of the plaintiffs in the above entitled action; that she has read the foregoing Bill of Complaint, knows the contents thereof and that the same is true as she verily believes.

ROSE PEERS *PICKERNELL.*

Subscribed and sworn to before me this 23rd day of November, 1926.

[Seal] JOHN W. HOWERTON,
Notary Public in and for the State of Washington, residing at Ilwaco, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 24, 1926.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [94]

United States District Court, Western District of Washington, Southern Division.

No. 307-E.

ROSE PEERS PICKERNOLL,
MABEL PEERS WHITE, and
AMELIA PEERS ALDEN,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiffs' bill of complaint, admits, denies and alleges as follows:

I.

Answering paragraph I of plaintiffs' bill of complaint, defendant denies that plaintiffs are members of the Quinaielt Tribe of Indians, and admits every other material allegation therein contained.

II.

Referring to paragraph II, defendant admits that Henry Peers is the father of the above named plaintiffs; defendant denies that said Henry Peers was a member of an associated and affiliated band of Indians of the Quinaielt Tribe; defendant admits that the father of these plaintiffs was a fish-eating Indian, but denies that said father of these plaintiffs was a member of any tribe entitled to rights in the Quinaielt Reservation; defendant admits that the mother of these plain-

tiffs was Judith Ducheney, but denies that said mother of these plaintiffs was a member of the Quinaielt Tribe of Indians.[95]

III.

Referring to paragraph III, defendant denies each and every material allegation therein contained.

IV.

Referring to paragraph IV, defendant has not sufficient knowledge, information or belief, and therefore denies the same.

V.

Referring to paragraph V, defendant admits the same.

VI.

Referring to paragraph VI, defendant admits that a special Alloting Agent was sent to said Quinaielt Indian Reservation for the purpose of alloting land upon said Reservation to Indians entitled thereto; defendant denies each and every other material allegation therein contained.

VII.

Referring to paragraph VII, defendant denies each and every material allegation therein contained.

VIII.

Referring to paragraph VIII, defendant admits the same.

IX.

Referring to paragraph IX, defendant admits that it has refused to allot said lands to the plaintiffs herein;

defendant admits it has excluded, and still does exclude, said plaintiffs from said land, but denies that said acts are wrongful.

X.

Referring to paragraph X, defendant denies each and every material allegation therein contained.

WHEREFORE, having answered plaintiff's bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs. [96]

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Amended Answer, knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of November, 1927.

[Seal] ALINE ESLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 9, 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [97]

In the United States District Court for the Western District of Washington, Southern Division.

No. 307-E.

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE and AMELIA PEERS ALDEN,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE

This cause came on to be heard at this term, the plaintiffs appearing personally and by their counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its *counsel* Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the Court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to

the court upon written briefs, and *thereupkn* upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Rose Peers Pickernoll, Mabel Peers White and Amelia Peers Alden be and they are entitled to the lands heretofore selected by them, situate upon the Quinaielt Indian Reservation, within this District, in Grays Harbor County, in the State of Washington, to-wit:

Rose Peers Pickernoll—The East half of the Southeast quarter of Section Sixteen (16), Township Twenty-two (22) North, Range Twelve (12) West, Willamette Meridian. [98]

Mabel Peers White—The East half of the Northeast quarter of Section *Dixteen* (16), Township Twenty-two (22) North, Range Twelve (12) West, Willamette Meridian.

Amelia Peers Alden—The West half of the Southeast quarter of Section Sixteen (16), Township Twenty-two (22) North, Range Twelve (12) West, Willamette Meridian.

as allotments to be held and owned by said plaintiffs, in all respects as provided by law. It is further

ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiffs, certificates of allotment, to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States. It is further

ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators, and assigns are not entitled to said land as and for their allotment, with full right to use, build upon, clear, improve and occupy the same in all respects as provided by law; to all of which defendant excepts and its exception is allowed.

Done in open court this 24th day of December A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

D. SPAULDING,
Assistant Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [99]

United States District Court, Western District of Washington, Southern Division.

No. 307-E.

ROSE PEERS PICKERNOLL, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the lands selected for the allotment by the plaintiff were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to the plaintiffs any trust or fee patent therefor. [104]

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said treaty and actually agreed to the same and signed the same.

VII.

That the District Court erred in holding and finding that the decision and action of the Indian [105] Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been prop-

erly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a member of the tribal Indians of the Quinaielt Reservation were entitled to allotment thereon. [106]

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotments to the plaintiffs herein when the evidence adduced at the time of trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. McCUTCHEON,
Assistant United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March, 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, March 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [107]

United States District Court, Western District of Washington, Southern Division.

No. 307-E.

ROSA PEERS PICKERNOLL, et al.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein, it is hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United

States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March, 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, March 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [108]

United States District Court, Western District of Washington, Southern Division.

No. 309-E.

MARY FRANCIS PROVOE, LAURA M. BROWN, JOHN W. PROVOE, FRANK M. PROVOE, ROSA H. GARRARD, SARAH SPENCER, ISABELLE R. RAINEY, WILLIAM A. PROVOE, and RAYMOND A. PROVOE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT.

To the Honorable Judges of the Above Entitled Court; Sitting in Equity:

The plaintiffs complain of the defendant and for cause of action allege and say:

I.

That the plaintiffs are, and at all times since their birth have been persons of part Indian blood, over the age of 21 years, and members of the Quinaielt tribe of Indians, and reside in the State of Washington within this District.

II.

That the said Mary Frances Provoe, as before stated is an Indian, being a member of an associated and affiliated *ban* of Indians of the Quinaielt tribe, and a fish-eating Indian of the Pacific Coast in Western Washington, and is the mother of the plaintiffs, Laura M. Brown, John W. Provoe, Frank M. Provoe, Rosa H. Garrard, Sarah Spencer, Isabelle R. Rainey, William A. Provoe, and Raymond A. Provoe. The father of the above named children, and the husband of the said Mary Frances Provoe is named David Provoe, and he is also an Indian by blood. [109]

III.

That all of the plaintiffs were born in Southwestern Washington within this District, and have resided in said locality their entire lifetime, all of which time said plaintiffs have continuously lived as Indians, associating and affiliating with the Quinaielt Indians and associated and affiliated bands and tribes of the Quinaielt Indian Reservation. That about the year 1912 said plaintiffs in response to a notice sent out by the superintendent of the Quinaielt Indian Reservation Washington, appeared before the tribal council of said

Quinaielt tribe, at Taholah, Washington, upon said Quinaielt Indian Reservation, and were then and there by said tribe recognized as belonging to, and being a part of said Quinaielt tribe of Indians. That plaintiffs have many blood relatives allotted upon said Reservation, among whom are: Mary Sampson Johns, Lafayette Kindred, Kate Kindred Thomas, Fannie Delamater, Isaac Bastian, and Ida Gill.

IV.

That the plaintiffs as above set forth are all of one family, being as herein set forth Mary Frances Provoe and her children, and by reason of this fact, and the facts as hereinafter set forth relative to the selection and denial of certain allotments of land upon said Quinaielt Reservation under respectively the same conditions and like circumstances, these plaintiffs have a common interest in the subject matter of this action, and are affected in a similar manner.

V.

That the grounds upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and [110] members of the Quinaielt tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians, and other bands and tribes of Indians, and under the alloting acts of the United States to an allotment of at least 80 acres, each, of land upon the Quinaielt Indian Reservation in the State of Washington and within this District. The jurisdiction of the Court further depends upon the Acts of August 15, 1895 (28 Stat. L., 305), as amended by the Act of February 6, 1901 (31 Stat. L., 760), giving the right

to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about the year 1912 the plaintiffs applied to the defendant its officers and agents for an allotment of 80 acres of land, each, upon the said Quinaielt Indian Reservation, and were informed by the defendant, more particularly its superintendent of the said Quinaielt Indian Reservation, that while they were each entitled to an allotment of land no provision or appropriation had been made for the allotment of the remaining land upon said reservation, it being timber land, and upon several occasions subsequent to said time, plaintiffs applied for allotments of land, but were each time informed that while they were entitled to allotments, no provision or appropriation had been made for allotment, nor had any alloting agent been designated by the defendant to make allotments upon said reservation.

That about a year and a half ago a Special Alloting Agent was sent by the defendant, more particularly [111] the Secretary of the Interior to said Quinaielt Indian Reservation for the purpose of alloting land upon said reservation to Indians entitled thereto, and said plaintiffs in due course, and in accordance with law, regularly proceeded to make selections for allotment upon said Quinaielt Indian Reservation, which selections for allotment are described in words and figures as follows, towit:

Mary Frances Provoe—N/2 of SW/4 Sec 9 T 22 N.R. 12 W W M

William A. Provoe—SE/4 of SE/4 Sec 11 and the NE/4 of NE/4 Sec 14 T 22 N R 12 W W M

Raymond A. Provoe—W/2 of SE/4 Sec 28 T 23 N R 10 W W M

Laura M. Brown—W/2 of SW/4 Sec 21 T 21 N R 11 W W M

John W. Provoe—S/2 of NE/4 Sec 21 T 21 N R 11 W W M

Frank M. Provoe—W/2 of NW/4 Sec 17 T 21 N R 11 W W M

Rosa H. Garrard—Lots 1 and 2 Sec 19 T 23 N R10 W W M

Sarah Spencer—S/2 of SW/4 Sec 9 T 22 N R 12 W W M

Isabelle R. Rainey—N/2 of SE/4 Sec 9 T 22 N R 11 W W M

VII.

That thereafter plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval and granting of said allotments and the issuance of the necessary patents therefore except only the approval of the Secretary of the Interior. That recently the defendant, more [112] particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected refused and declined to allot to said plaintiffs the identical allotments herein described or any allotments of land upon the Quinaielt Indian Reservation whatsoever. That said denial and refusal of plaintiffs' rights to allotments was for no reason known to plaintiffs,

but that such refusal and denial is arbitrary and without reason, and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by plaintiffs are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all of the facts hereinbefore alleged, the defendant, its officers and agents, have wrongfully failed, neglected, and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude plaintiffs from said lands and have refused and still refuse to allow said plaintiffs to go upon or reside upon said lands or any portion thereof. [113]

X.

That the said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them, and that their rights be recognized and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE, plaintiffs pray judgment as follows:

I.

That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon live upon, cultivate and improve said lands as their homes, in all *resepcts* as provided by law.

II.

That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for Plaintiffs.

State of Washington,
County of Grays Harbor,—ss.

RAYMOND A. PROVOE, being first duly sworn on oath deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Bill of Complaint, knows the contents thereof, and that the same is true as he verily believes.

RAYMOND A. PROVOE. [114]

Subscribed and sworn before me this 21 day of January 1927.

[Notary Seal] CHAS. L. VAUGHAN,
Notary Public in and for the State of Washington,
residing at Oakville.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jan. 21, 1926.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [115]

United States District Court, Western District of Washington, Southern Division.

No. 309-E.

MARY FRANCIS PROVOE, LAURA M. BROWN, JOHN W. PROVOE, FRANK M. PROVOE, ROSA H. GARRARD, SARAH SPENCER, ISABELLE R. RAINEY, WILLIAM A. PROVOE, and RAYMOND A. PROVOE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorneys and in answer to the plaintiffs' Bill of Complaint, admits, denies and alleges as follows:

I.

In answer to paragraph I of plaintiffs' Bill of Complaint, defendant admits that the plaintiffs are of part Indian blood, but denies that they are of Quinaielt or Quileute, or of any of the tribes affiliated with them in the Treaties of July 1, 1855 and January 25, 1856 (12 Stat. L. 971).

II.

In answer to paragraph II of plaintiffs' Bill of Complaint, defendant denies each and every allegation therein contained.

III.

In answer to paragraphs III and IV of plaintiffs' Bill of Complaint, the defendant, for lack of information, knowledge or belief, denies each and every allegation therein contained.

IV.

In answer to paragraph V, defendant admits the jurisdiction of the Court, but denies each and every other allegation therein contained. [116]

V.

Answering paragraph VI of plaintiffs' complaint, defendant admits that a special allotting agent was sent by the Secretary of the Interior to the said Quinaielt Indian Reservation for the purpose of allotting lands upon said Reservation to Indians entitled thereto, and denies each and every other allegation therein contained.

VI.

In answer to paragraph VII of plaintiffs' complaint, defendant denies each and every allegation therein contained.

VII.

Defendant admits paragraph VIII of plaintiffs' Bill of Complaint.

VIII.

In answer to paragraph IX, defendant admits the acts alleged therein, but denies that said acts are unlawful.

IX.

In answer to paragraph X, defendant denies the same.

WHEREFORE, Having answered plaintiffs' Bill of Complaint, defendant prays that said action be dismissed, and that it have and recover its costs therein.

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney. [117]

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn on oath, deposes, and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Answer; knows

the contents thereof, and that the same is true as he verily believes.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of Nov. 1927.

ALINE ESLER,

Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 9, 1927.

ED. M. LAKIN,
Clerk.

By E. R.,
Deputy. [118]

In the United States District Court for the Western District of Washington, Southern Division.

No. 309-E.

MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. PROVOE, JOHN W. PROVOE, ROSA H. GARRARD, SARAH SPENCER, ISABELLE R. RAINEY, WILLIAM A. PROVOE, and RAYMOND A. PROVOE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Mary Francis Provoe, Laura M. Brown,

Frank M. Provoe, Rosa H. Garrard, Sarah Spencer, Isabelle R. Rainey, William A. Provoe and Raymond A. Provoe appearing by their counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the Court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the Court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Mary Francis Provoe, Laura M. Brown, Frank M. Provoe, Rosa H. Garrard, Sarah Spencer, Isabelle R. Rainey, William A. Provoe, and Raymond A. Provoe be and they [119] are entitled to the lands heretofore selected by them, situate upon the Quinaielt Indian Reservation, within this district, Grays Harbor County, in the State of Washington, to-wit:

Mary Francis Provoe—The North half of the Southwest quarter of Section Nine (9), Township Twenty-two (22) North, Range Twelve (12) West, Willamette Meridian.

William A. Provoe—The southwest quarter of the Southeast quarter of Section Eleven (11) and the Northeast quarter of the Northeast quarter of Section Fourteen (14), Township Twenty-

two (22) North, Range Twelve (12) West, Willamette Meridian.

Raymond A. Provoe—The West half of the Southeast quarter of Section Twenty-eight (28), Township Twenty-three (23) North, Range Ten (10) West, Willamette Meridian.

Laura M. Brown—The West half of the Southwest quarter of Section Twenty-one (21), Township Twenty-one (21) North, Range Eleven (11) West, Willamette Meridian.

Frank M. Provoe—The West half of the Northwest quarter of Section Seventeen (17), Township Twenty-one (21) North, Range Eleven (11) West, Willamette Meridian.

Rosa H. Garrard—Lots 1 and 2, Section Nineteen (19) Township Twenty-three (23) North, Range Ten (10) West, Willamette Meridian.

Sarah Spencer—The South half of the Southwest quarter of Section Nine (9), Township Twenty-two (22) North, Range Twelve (12) West, Willamette Meridian.

Isabelle R. Rainey—The North half of the Southeast quarter of Section Nine (9), Township Twenty-two (22) North, Range Eleven (11) West, Willamette Meridian.

as allotments to be held and owned by said plaintiffs, in all respects as provided by law. It is further

ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiffs, certificates of allotment of said lands heretofore described, said certificates of allotment to be in effect

and to award to said plaintiffs all of the rights to which said plaintiffs [120] are entitled under and by virtue of the laws of the United States. It is further

ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns, are not entitled to said land as and for their allotment, with full right to use, build upon, clear, improve, and occupy the same in all respects as provided by law; to all of which defendant excepts, and its exception is allowed. It is further

ORDERED, ADJUDGED AND DECREED that inasmuch as John W. Provoe has died since the beginning of this action, that he be not granted any allotment of land upon the Quinaielt Indian Reservation, but that said action as to him be and the same is hereby *doscontinued,* without prejudice to his heirs to apply for said allotment in proper proceeding.

Done in open court this 24th day of December, A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [121]

United States District Court, Western District of Washington, Southern Division.

No. 309-E.

MARY FRANCIS PROVOE, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error

said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the land selected for allotment by the plaintiffs was subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such land allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the said plaintiffs, or to issue to [124] plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the land selected for their allotment, and that the plaintiffs are entitled to have said land allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from

hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said land.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same. [124A]

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that

the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe in 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [125] member by the tribal Indians of the Quinaielt Reservation were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotments to the plaintiffs herein when the evidence adduced at the time of trial herein was insufficient to sustain said

decree and exceptions to said defree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March, 1929.

STUART H. ELLIOTT
and
H. G. and DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar. 20, 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [126]

United States District Court, Western District of Washington, *Northern* Division.

No. 309-E.

MARY FRANCIS PROVOE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of Mar. 1929.

STUART H. ELLIOTT
and
H. G. and DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar. 20, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [127]

United States District Court, Western District of Washington, Southern Division.

No. 312E

LULA M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, MARION E. ELLIOTT, EMMA S. ELLIOTT, and NORMA C. ELLIOTT, Minors, by J. H. ELLIOTT, guardian ad litem,

Plaintiffs.

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court, sitting in Equity:

The plaintiffs complain of the defendant, and for cause of action allege and say:

I.

That the plaintiffs are and at all times since their birth have been persons of part Indian blood, and

members of the Quinaielt Tribe of Indians of Grays Harbor County, Washington within this District, and that the said J. H. Elliott was duly and in accordance with law appointed guardian ad litem of the said plaintiffs by the above entitled court upon the 1st day of February 1927, and he duly qualified as guardian ad litem, and is now acting as such upon the behalf of the plaintiffs herein.

II.

That the father of said plaintiffs is named J. H. Elliott, and he is a duly enrolled and allotted Indian of the Quinaielt Indian Reservation Washington, and the mother of the said plaintiffs is named Josephine Johnson Elliott, and she is a duly enrolled and allotted Indian of the Quinaielt Indian Reservation, Washington, within this District, and that all of the above named minor children the plaintiffs [128] herein with the exception of the said Norma C. Elliott were born and reared in Wahkiakum County, Washington within this District, and that the family have made their home at said place the greater part of their lifetime. That the said J. H. Elliott is a fisherman by occupation, and fishes in the Columbia River on both banks thereof, and he at present makes his home in Astoria Oregon until such time as he shall remove to the Quinaielt Indian Reservation where he and the mother of said minor children have been recently given an allotment of land.

III.

That the defendant has recognized many members of plaintiff's family, and have enrolled and allotted

many members of said family among whom, are the father of the plaintiff's, J. H. Elliott, the mother of said plaintiffs Josephine Johnson Elliott, the maternal grandmother of said plaintiff's, Adeline Lohre, the paternal grandmother, Agnes Elliott, the following named maternal uncles and aunts, Louise E. Henry, George R. Elliott, J. GrantElliott, Edmund C. Elliott, Eliza L. Miles, Grace Heiner, Charles G. Elliott, and Williams A. Elliott, the following named maternal aunts, Daisy Walters Borg, Ellen Baker, Sophia Millett, Frances James, Eleanor James, and Cora Walters John, Sophia Millett, and numerous cousins, and more distant relatives.

IV.

That the plaintiffs as above set forth are full blood sisters and that by reason of this fact and the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation, under respectively the same conditions and like [129] circumstances, these plaintiffs have a common interest in the subject matter of this action and are affected in a *simular* manner.

V.

That the ground upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt Tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the allotment acts of the United States, to an allotment of at least 80 acres, each, of land upon the said Quin-

aielt Indian Reservation in the State of Washington within this District. The jurisdiction of the Court further depends upon the Acts of August 15, 1894 (28 Stat. L., 305) as amended by the Act of February 6, 1901 (31 Stat. L., 760) giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago a Special Alloting Agent was sent by the defendant, more particularly the Secretary of the Interior to said Quinaielt Indian Reservation for the purpose of alloting land upon said reservation to Indians entitled thereto, and said plaintiffs in due course and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Reservation, which said selections for allotment are described in words and figures as follows: to-wit:

Lula M. Elliott—N/2 of NE/4 Sec 16 T 21 N R 11 W W M in Washington [130]

Sophie M. Elliott,—S/2 of NW/4 Sec 10 T 21 N R 12 W W M in Washington.

Carolyn M. Elliott,—E/2 of NE/4 Sec 17 T 22 N R 12 W W M in Washington.

Marion E. Elliott,—E/2 of SE/4 Sec 17 T 22 N R 12 W W M in Washington.

Emma S. Elliott,—S/2 of NW/4 Sec 16 T 22 N R 12 W W M in Washington.

Norma C. Elliott,—N/2 of SW/4 Sec 16 T 22 N R 12 W W M in Washington.

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington D. C. in accordance with law, and each and every step was regularly completed for the actual approval and granting said allotments and the issuance of the necessary patents therefor except only the approval of the Secretary of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs neglected, refused and declined to allot to said plaintiffs the identical allotments herein described or any allotments of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of plaintiff's rights to allotment was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs [131] herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all the facts hereinbefore alleged, defendant, its officers and agents, have wrong-

fully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude plaintiffs herein from said lands and have refused and still refuse to let said plaintiffs go upon or reside upon said lands or any portion thereof.

X.

That said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them and that their rights be recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE plaintiffs pray judgment as follows:—

I.

That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and [132] improve said lands as their homes, in all respects as provided by law.

II.

That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for plaintiffs.

State of Oregon,
County of Clatsop,—ss.

J. H. ELLIOTT, being first duly sworn deposes and says: That he is the duly appointed and qualified guardian ad litem of the plaintiffs above named; that he makes this verification for and on behalf of said minors as such guardian ad litem; that he has read and knows the contents of the foregoing Bill of Complaint, and that the statements therein contained are true as he verily believes.

J. H. ELLIOTT.

Subscribed and sworn before me this 17 day of January 1927.

[Notary Seal] O. A. WIOKKALA,

Notary Public in and for the State of Oregon, residing at Astoria, Oregon

[Endorsed]: Filed in the United States District Court Western District of Washington Southern Division Feb. 1, 1929

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [133]

United States District Court, Western District of Washington, Southern Division.

NO. 312 E

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, MARION E. ELLIOTT, EMMA S. ELLIOTT, and NORMA C. ELLIOTT, Minors, by J. H. ELLIOTT, guardian ad litem,

Plaintiffs.

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiffs' bill of complaint, admits denies and alleges as follows:

I.

Referring to paragraph I of plaintiffs' bill of complaint, defendant *denies* that plaintiffs are members of the Quinaielt Tribe of Indians and *admits* each and every other material allegation contained therein.

II.

Referring to paragraphs II, III, IV defendant *admits* the same.

III.

Referring to paragraph V defendant *admits* the jurisdiction of the above entitled court and *denies* each and every other material allegation therein contained.

IV.

Referring to paragraph VI defendant *admits* the same. [134]

V.

Referring to paragraph VII defendant *admits* that the Secretary of the Interior and the Commissioner of Indian Affairs has refused to allot lands of the Quinaielt Indian Reservation to the plaintiffs; defendant denies each and every other material allegation therein contained.

VI.

Referring to paragraph VIII defendant *admits* the same.

VII.

Referring to paragraph IX defendant *admits* that it has refused to allot lands on the Quinaielt Indian Reservation to the plaintiffs herein, but denies that said refusal was wrongful.

VIII.

Referring to paragraph X defendant *denies* the same.

WHEREFORE, having answered plaintiffs' bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney.

United States of America
Western District of Washington
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing amended Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 10th day of November, 1927.

[Seal] ALINE ESLER,

Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov 11 1927.

ED. M. LAKIN,
Clerk.

By ER,
Deputy. [135]

United States District Court, Western District of Washington, Southern Division.

No. 312-E

LULA M. ELLIOTT, et al,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR AMENDMENT OF COMPLAINT.

IT IS HEREBY STIPULATED by and between the plaintiffs and the defendant above named, by their counsel, that the bill of complaint in said action may be amended in the following particulars:—

That paragraph VI may be amended so that after the words, Lula M. Elliott the words, "N/2 of NE/4 Sec 16 T 21 N R 11 W W M in Washington" may be changed to: "Lot 4 and the southwest quarter of northwest quarter of Sec. 3, Tp. 22 N., R. 11 W., W. M."

And after the words, Sophie M. Elliott the words, "S/2 of NW/4 Sec 10 T 21 N R 12 W W M in Washington," may be changed to: "North half of northwest quarter of Sec. 22, Tp. 22 N., R. 11 W., W. M."

And after the words, "Carolyn M. Elliott, the words, "E/2 of NE/4 Sec 17 T 22 N R 12 W W M in Washington," may be changed to: "West half of

southeast quarter of Sec. 1, Tp. 22 N., R. 11 W., W. M."

for the reason that by and with the consent of the defendant said plaintiffs in this paragraph mentioned have made the selections herein mentioned to be placed in the amended complaint in lieu of the tracts of land described in the bill of complaint as selected by them.

Dated this 10th day of January, 1928.

STUART H. ELLIOTT,

H. G. & DIX H. ROWLAND,

Attorneys for plaintiffs.

THOS. P. REVELLE,

DAVID L. SPAULDING,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jan 10 1928.

ED. M. LAKIN,

Clerk.

By Lakin, [136]

In the United States District Court for the Western District of Washington, Southern Division.

No. 312-E

LULA M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, MARION E. ELLIOTT, EMMA S. ELLIOTT, and NORMA C. ELLIOTT, Minors, by J. H. ELLIOTT, guardian ad litem,

Plaintiffs.

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Lula M. Elliott, Sophie M. Elliott, Carolyn M. Elliott, Marion E. Elliott, Emma S. Elliott, and Norma C. Elliott, by J. H. Elliott, guardian ad litem, appearing by their counsel Stuart H. Elliott and H. G. and Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Washington, David Spaulding, Assistant U. S. District Attorney, Seattle, Washington, John T. McCutcheon, Assistant U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decison herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Lula M. Elliott, Sophie M. Elliott, Carolyn M. Elliott, Marion E. Elliott, Emma S. Elliott, and Norma C. Elliott be and they are hereby entitled to the lands heretofore selected by them, situate upon the Quinaielt Indian Reservation, within [137] this District, in Grays Harbor County, in the State of Washington, towit:

Lula M. Elliott—The North half of the Northeast Quarter of Section Sixteen (16), in Township Twenty-one (21) North, Range Eleven (11) West of the Willamette Meridian.

Sophie M. Elliott—The West Half of the Northeast Quarter of Section Sixteen (16), in Township Twenty-two (22) North, Range Eleven (11) West of the Willamette Meridian.

Carolyn M. Elliott—The East Half of the Northeast Quarter of Section Sixteen (16), in Township Twenty-two (22) North, Range Eleven (11) West of the Willamette Meridian.

Marion M. Elliott—Lot Two (2) and the Southwest Quarter of the Northwest Quarter of Section Five (5) in Township Twenty-two (22) North, Range Twelve (12) West of Willamette Meridian.

Emma S. Elliott—The South Half of the Northwest Quarter of Section Sixteen (16), in Township Twenty-two (22) North, Range Twelve West of the Willamette Meridian.

Norma C. Elliott—The North Half of the Southwest Quarter of Section Sixteen (16), in Township Twenty-two (22) North, Range Twelve (12) West of the Willamette Meridian.

as allotments to be held and owned by said plaintiffs, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiffs, certificates of allotment of said lands heretofore described, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns, are not entitled to said la[illegible] as and for their allotment, with full right to use, build upon, clear, improve, and occupy the same in all respects as [138] provided by law, to all of which the defendant excepts and its exception is allowed.

Done in open court this 5th day of Feb. 1929.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, Feb 5 1929.

ED. M. LAKIN,
Clerk.

By E. R.,
Deputy. [139]

United States District Court, Western District of Washington, Southern Division.

No. 312-E

LULU M. ELLIOTT, et al,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 5th day of February, 1929, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to [144] the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made

under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same. [145]

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the

passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [146] member of the tribal Indians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on February 5, 1929, awarding allotments to the plaintiffs herein when the evidence adduced at the time of the trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of al-

lotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [147]

United States District Court, Western District of Washington, Southern Division.

No. 312-E

LULA M. ELLIOTT, et al,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and Decree heretofore entered and filed herein on the 5th day of February, 1929, be and the same is hereby allowed.

It is further ordered that a certified transcript of record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Received a copy of the within Order this 20th day of Mar 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [148]

United States District Court, Western District of Washington, Southern Division.

No. 314-E.

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, *JAUNITA* CHRISTOFFSON, and ROBERT ROLFSON, DONALD SMITH, VIVIAN FORDEN, Minors, by LIZZIE ROLFSON, Guardian ad Litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the above entitled court, sitting in equity:

The plaintiffs complain of the defendant and for cause of action allege and say:

I.

That the plaintiffs are, and at all times since their birth have been persons of part Indian blood, members of the Quinaielt Tribe of Indians, and reside at and in Grays Harbor County, within this District.

II.

That the plaintiffs as before stated, are Quinaielt Indians, and have always been recognized as such by said Quinaielt Indians, that they belong to the Lower Chehalis branch of said Quinaielt Tribe, and that said plaintiffs belong to, and have associated and affiliated with the associated bands and tribes of fish-eating Indians of the Pacific Coast in Western Washington, and have for many years past made their home in the immediate proximity of the said Quinaielt Indian Reservation.

III.

That the plaintiff, Alvin Smith is a Quinaielt Indian and the father of the plaintiff, Donald Smith. That the [149] plaintiff, Vivian Forden, is the daughter of Juanita Christoffson. That Alvin Smith, Eugene Smith, Juanita Christoffson, and Robert Rolfson are the children of Lizzie Rolfson, and that the said Lizzie Rolfson was duly and in accordance with law appointed guardian ad litem of the plaintiffs, Robert Rolfson, Donald Smith, and Vivian Forden, by the above entitled court upon the 1st day of February 1927, and she duly qualified as guardian ad

litem, and is now acting as such upon the behalf of the above named minor plaintiffs herein.

IV.

That the plaintiffs as above set forth are all members of the same family, and by reason of this fact and the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation, under respectively the same conditions and like circumstances these plaintiffs have a common interest in the subject matter of this action and are affected in a similar manner.

V.

That the ground upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt Tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the allotment acts of the United States to an allotment of at least 80 acres, each, of land upon the said Quinaielt Indian Reservation in the State of Washington within this District. The Jurisdiction of the Court further depends upon the Acts of August 15, 1894 [150] (28 Stat. L., 305) as amended by the Act of February 6, 1901 (31 Stat. L., 760) giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago a Special Alloting Agent was sent by the defendant, more particularly the

Secretary of the Interior to said Quinaielt Indian Reservation for the purpose of alloting land upon said reservation to Indians entitled thereto, and said plaintiffs in due course and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Reservation, which said selections for allotment are described in words and figures as follows; to-wit:

Lizzie Rolfson—N/2 of SE/4 Sec 36 T 23 N R 13 W W M in Washington.

Alvin Smith—SW/4 of NW/4 and the NW/4 SW/4 Sec 8 T 21 N R 11 W W. M in Washington.

Eugene Smith—SE/4 NW/4 and the NE/4 SW/4 Sec 8 T 21 N R 11 W W M in Washington.

Juanita Christoffson—E/2 of NE/4 Sec 16 T 22 N R 11 W W M in Washington.

Robert Rolfson—W/2 of NE/4 Sec 16 T 22 N R 11 W W M in Washington.

Donald Smith—Lot 1, and NW/4 SE/4 Sec 11 T 22 N R 11 W W M in Washington.

Vivian Forden—Lot 2 and SW/4 SE/4 Sec 11 T 22 N R 11 W W M in Washington.

VII.

That thereafter, plaintiffs are informed and believe said selections were regularly forwarded to the Secretary of the Interior at Washington D. C. in accordance with law, and each and every step was regularly taken and [151] *and* completed for the actual approval

and granting said allotments and the issuance of the necessary patents therefor except only the approval of the Secretary of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs neglected, refused and declined to allot said plaintiffs the identical allotments herein described or any allotments of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of plaintiff's rights to allotment was for no reason known to plaintiffs, but such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the acts of Congress of the United States, its laws and treaties, and the refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government, and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all the facts hereinbefore alleged, defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and *excluse* plaintiffs herein from said lands and have refused and still

refuse to let said plaintiffs go upon live upon, or reside upon said lands or any portion [152] thereof.

X.

That said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them and that their rights be recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE PLAINTIFFS PRAY JUDGMENT AS FOLLOWS:

I.

That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified to the Secretary of the Interior and that plaintiffs be awarded said land as their allotments and that they be adjudged and decreed to have full rights, power and authority to go upon, live, upon, and cultivate and improve said lands as their homes, in all respects as provided by law.

II.

That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for Plaintiffs.

State of Washington,
County of Grays Harbor—

LIZZIE ROLFSON being first duly sworn on oath deposes and says; that she is one of the plaintiffs in [153] the above entitled action, that she has read the foregoing bill of complaint, knows the contents thereof, and that the same is true as she verily believes.

LIZZIE ROLFSON.

Subscribed and sworn before me this 26th day of January 1927.

[Seal] J. A. FAIRBAIRN,

Notary Public in and for the State of Washington, residing at Hoquiam, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Feb. 1, 1927.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [154]

United States District Court, Western District of Washington, Southern Division.

No. 314-E.

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, JUANITA CHRISTOFFSON, and ROBERT ROLFSON, DONALD SMITH, VIVIAN FORDEN, Minors, by LIZZIE ROLFSON, Guardian ad Litem,

vs.

THE UNITED STATES OF AMERICA.

AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of amended answer to plaintiffs' bill of complaint, admits, *denies* and alleges as follows:

I.

Referring to paragraph I of plaintiffs' bill of complaint, defendant *denies* plaintiffs are members of the Quinaielt tribe of Indians.

II.

Referring to paragraph II, defendant *admits* that plaintiffs had made their home in the proximity of said Quinaielt Indian Reservation; defendant *denies* each and every other material allegation therein contained.

III.

Referring to paragraph III, defendant *denies* that the plaintiff, Alvin Smith, or any of the plaintiffs, are

members of the Quinaielt Tribe of Indians; defendant *admits* each and every other material allegation therein contained.

IV.

Referring to paragraph IV, defendant *admits* the same. [155]

V.

Referring to paragraph V, defendant *admits* the jurisdiction of the above entitled court, but *denies* each and every other material allegation therein contained.

VI.

Referring to paragraph VI, defendant *admits* the same.

VII.

Referring to paragraph VII, defendant *admits* that the Secretary of the Interior and the Commissioner of Indian Affairs has refused to allot the described lands to said plaintiffs; defendant *denies* each and every other material allegation therein contained.

VIII.

Referring to paragraph VIII, defendant *admits* the same.

IX.

Referring to paragraph IX, defendant *admits* that it has refused to allot said lands to the plaintiffs, but *denies* that said refusal was wrongful.

X.

Referring to paragraph X, defendant denies the same.

WHEREFORE, having answered plaintiff's bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVELLE,
United States Attorney.
DAVID L. SPAULDING,
Assistant United States Attorney. [156]

United States of America,
Western District of Washington,
Southern Division—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Amended Answer, knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of November, 1927.

[Seal] ALINE ESLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 11, 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [157]

In the United States District Court for the Western District of Washington, Southern Division.

No. 314 E.

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, JUANITA CHRISTOFFSON, and ROBERT ROLFSON, DONALD SMITH, VIVIAN FORDEN, Minors, by LIZZIE ROLFSON, Guardian ad Litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Lizzie Rolfson, Alvin Smith and Eugene Smith appearing personally, and the plaintiff Juanita Christoffson appearing personally, and the plaintiffs Robert Rolfson, Donald Smith and Vivian Forden, minors, appearing by their guardian ad litem Lizzie Rolfson, and all of the plaintiffs appearing by their counsel Stuart H. Elliott, and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said

cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Lizzie Rolfson, Alvin Smith and Eugene Smith be and they are hereby entitled to the lands heretofore selected by them, situate upon the Quinaielt [158] Indian Reservation, within this District, in Grays Harbor County, in the State of Washington, to-wit:

Lizzie Rolfson—The North half of the Southeast quarter of Section Thirty-six (36), Township Twenty-three (23) North, Range Thirteen (13) West, Willamette Meridian.

Alvin Smith—The Southwest quarter of the Northwest quarter of the Northwest quarter of the Southwest quarter of Section Eight (8), Township Twenty-one (21) North, Range Eleven (11) West, Willamette Meridian.

Eugene Smith—The Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Section Eight (8), Township Twenty-one (21) North, Range Eleven (11) West, Willamette Meridian.

as allotments to be held and owned by said plaintiffs, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiffs Lizzie Rolfson, Alvin Smith and Eugene Smith, certificates of allotment of said lands heretofore described, said certificates of allotment to be in effect and to award to said plaintiffs all

of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs Lizzie Rolfson, Alvin Smith and Eugene Smith, their heirs, executors, administrators and assigns, are not entitled to said land as and for their allotment, with full right to use, build upon, clear, improve, and occupy the same in all respects as provided by law. [159]

It is FURTHER ORDERED, ADJUDGED AND DECREED; that the plaintiffs Juanita Christoffson, Robert Rolfson, Donald Smith and Vivian Forden are not entitled to allotments of land upon the Quinaielt Indian Reservation sued for by them, and that their application on and petition for such allotments set forth in their complaint be and the same are hereby denied; that plaintiff excepts to so much of said order as denies said allotment to Juanita Christoffson, Robert Rolfson, Donald Smith and Vivian Forden, and said exception is allowed; defendant excepts to so much of said order as allots any land to any of said plaintiffs and its exception is allowed.

Done in open court this 24th day of December A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

D. SPAULDING,
(Asst. U. S. Attorney.)

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [160]

United States District Court, Western District of Washington, Southern Division.

No. 314-E

LIZZIE ROLFSON, et al,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associte Counsel, and respectfully submits the following Assignments of Error upon which it relies in support

of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to [163] the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a

decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same. [164]

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a [165] member of the tribal Indians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on December 24, 1928, awarding allotments to the plaintiffs herein when the evidence adduced at the time of the trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. McCUTCHEON,
Assistant United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within assignments this 19th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [166]

United States District Court, Western District of Washington, Southern Division.

No. 314-E

LIZZIE ROLFSON, et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [167]

United States District Court, Western District of Washington, Southern Division.

No. 315 E

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, and EDNA WEISS, Minors, by KATE WALKOWSKY WEISS, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court, Sitting in Equity—

The plaintiffs complain of the defendant, and for cause of action allege and say:—

I.

That the plaintiffs are and at all times since their birth have been persons of part Indian blood, and members of the Quinaielt Tribe of Indians of Grays

Harbor County, Washington, within this District, and that the said Kate Walkowsky Weiss was duly and in accordance with law appointed guardian ad litem of the said plaintiffs by the above entitled court upon the 11th day of April 1927, and she duly qualified as guardian ad litem, and is now acting as such upon the behalf of the plaintiffs herein.

II.

That the father of the plaintiffs, Virginia, Alvin, and Catherine Walkowsky was a white man named John Walkowsky, and that he is now deceased, that the father of Edna Weiss is a white man named Robert Weiss and that he is still living. That the mother of the all of the above named plaintiffs is Kate Walkowsky Weiss, and she is a duly enrolled and allotted Indian of the Quinaielt [168] tribe of Indians. That all of the above named minor children plaintiffs herein, were born and reared, and now live in Pacific County, Washington, within this District. That the mother of said plaintiffs has been but recently allotted land upon the Quinaielt Indian Reservation, and expects to make her home upon said Reservation when the land is cleared and a home established thereon.

III.

That the defendant has recognized many members of the plaintiffs family, and have enrolled and allotted many members of said family, among whom are the mother of the plaintiffs, Kate Walkowsky Weiss, who is Quinaielt allottee No. 868, the brother of the plaintiffs, Albert Walkowsky who is Quinaielt allottee No. 869, a sister, Louise Walkowsky Quinaielt

allottee No. 870, a brother, Frank Walkowsky, Quinaielt allottee No. 871, a sister, Ida Walkowsky, Quinaielt allottee No. 872, a brother, Leonard Walkowsky, Quinaielt allottee No. 873, a sister Rose Walkowsky, Quinaielt-allottee No. 874, and a sister Grace Walkowsky Griggs, Quinaielt allottee No. 758. That defendant has recognized and allotted upon the said Quinaielt Indian Reservation many other members of the plaintiffs family more distantly related than those above set forth.

IV.

That the plaintiffs are as above set forth brother and sisters, and by reason of this fact, and the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation, under respectively the same conditions and like circumstances, these plaintiffs have a common [169] interest in the subject matter of this action, and are affected in a similar manner.

V.

That the ground upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt Tribe of *Indian*, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians, and other bands of Indians, and under the allotment acts of the United States, to an allotment of at least 80 acres, each, of land upon the said Quinaielt Indian Reservation in the State of Washington within this Dstrict. The jurisdiction further depends upon the Acts of August 15, 1894 (28 Stat. L., 305), as amended by the Act of February 6, 1901

(31 Stat. L., 760) giving the rights to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago a Special Alloting Agent was sent by the defendant, more particularly the Secretary of the Interior *ro* said Quinaielt Indian Reservation for the purpose of alloting lands upon said reservation to Indians entitled thereto, and said plaintiffs in due course, and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Reservation, which said selections for allotments are described in words and figures as follows; to-wit:

Virginia Walkowsky—N/2 of NW/4 Sec 31 T 21 N R 11 W W M in Washington

Alvin Walkowsky—W/2 of SW/4 Sec 29 T 21 N R 11 W W M in Washington [170]

Catherine Walkowsky—N/2 of SE/4 Sec 29 T 21 N R 11 W W M in Washington

Edna Weiss—S/2 of SW/4 Sec 30 T 21 N R 11 W W M in Washington

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington D. C. in accordance with law, and each and every step was regularly completed for the actual approval and granting said allotments and the issuance of the necessary patents therefor except only the approval of the Secre-

tary of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected, refused and declined to allot said plaintiffs the identical allotments herein described or any allotment of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of the plaintiffs rights to an allotment was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States. [171]

IX.

That notwithstanding all of the facts hereinbefore alleged, defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude plaintiffs herein from said lands and have refused and still refuse to let said plaintiffs go upon or reside upon said lands or any portion thereof.

X.

That said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them and that their rights be recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE plaintiffs pray judgment as follows:

I.

That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified to the Secretary of the Interior, and that plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said lands as their homes, in all respects as provided by law.

II.

That the plaintiffs have all other and further relief as is equitable and just. [172]

STUART H. ELLIOTT,

H. G. & DIX H. ROWLAND,

Solicitors for Plaintiffs.

State of Washington,
County of Pacific,—ss.

KATE WALKOWSKY WEISS, being first duly sworn deposes and says; That she is the duly appointed and qualified guardian ad litem of the plaintiffs above named; that she makes this verification for and upon behalf of said minors as such guardian ad litem; that she has read and knows the contents of the foregoing Bill of Complaint, and that the statements therein are true as she verily believes.

KATE WALKOWSKY WEISS.

Subscribed and sworn before me this 8th day of February 1927.

[Notary Seal] GEO. J. DEVER,

Notary Public in and for the State of Washington residing at So. Bend, Wn.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Feb 24, 1927.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [173]

United States District Court, Western District of Washington, Southern Division.

No. 315-E

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, and EDNA WEISS, Minors, by KATE WALKOWSKY WEISS, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

SECOND AMENDED ANSWER.

Comes now the above named defendant by its attorney, and by way of Second Amended Answer to plaintiffs' bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiffs' bill of complaint, defendant denies that plaintiffs are members of the Quinaielt Tribe of Indians and admits every other allegation therein contained.

II.

Referring to paragraph II of plaintiffs' bill of complaint, defendant denies that KATE WALKOWSKY WEISS, Guardian ad litem, is a duly enrolled and allotted Indian of the Quinaielt Tribe of Indians, and admits each and every other material allegation therein contained.

III.

Referring to paragraph III, defendant admits the same.

IV.

Referring to paragraph IV, defendant denies each and every material allegation therein contained.

V.

Referring to paragraph V, defendant admits the jurisdiction of the above entitled court, and denies each and every other material allegation therein contained. [174]

VI.

Referring to paragraph VI defendant admits that a Special allotting agent was sent to said Quinaielt Reservation for the purpose of allotting lands to Indians entitled thereto and defendant denies each and every other material allegation therein contained.

VII.

Referring to paragraph VII, defendant denies each and every material allegation contained therein.

VIII.

Referring to paragraph VIII defendant admits that the lands referred to in paragraph VI of plaintiffs' bill of complaint are surveyed and unallotted, unimproved, vacant Indian lands, and subject to selection and allotment under the laws of the United States.

IX.

Referring to paragraph IX defendant admits that it has refused to allot lands to plaintiffs herein, but denies that said refusal was wrongful.

X.

Referring to paragraph X defendant denies each and every material allegation therein contained.

WHEREFORE, having answered plaintiffs' bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVELLE,
United States Attorney.

DAVID SPAULDING,
Assistant United States Attorney. [175]

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Second Amended Answer; knows the contents thereof, and believes the same to be true.

DAVID L. SPAULDING.

[Seal] Subscribed and sworn to before me this 10th day of January, 1928.

ED. M. LAKIN,
Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Jan 11, *1920.*

ED. M. LAKIN,
Clerk.
By Lakin
[176]

In the United States District Court for the Western District of Washington, Southern Division.

No. 315--E

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, and EDNA WEISS, Minors, by KATE WALKOWSKY WEISS, guardian ad litem,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Virginia Walkowsky, Alvin Walkowsky, Catherine Walkowsky, and Edna Weiss, Minors, by Kate Walkowsky Weiss, guardian ad litem, appearing by their counsel Stuart H. Elliott and H. G. and Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the Court having taken the matter under advisement and ren-

dered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Virginia Walkowsky, Alvin Walkowsky and Catherine Walkowsky be and they are hereby entitled to the lands heretofore selected by them, situate upon the Quinaielt Indian Reservation, within this District, in Grays Harbor County, in the State of Washington, to-wit: [177]

Virginia Walkowsky—The North half of the Northwest quarter of Section Thirty-one (31) in Township Twenty-one (21) North, Range Eleven (11) West of the Willamette Meridian.

Alvin Walkowsky—The West half of the Southwest quarter of Section Twenty-nine (29), in Township Twenty-one (21) North, Range Eleven (11) West, of the Willamette Meridian.

Catherine Walkowsky—The North Half of the Southeast quarter of Section Twenty-nine (29), in Township Twenty-one (21) North, Range Eleven (11) West, of the Willamette Meridian.

as allotments to be held and owned by said plaintiffs, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff Edna Weiss, is not entitled to an allotment, and that her petition to be allotted upon the Quinaielt Indian Reservation be and the same is hereby denied.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and

agents, be and they are hereby ordered and directed to issue to said plaintiffs, certificates of allotment of said lands heretofore described, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns, are not entitled to said land as and for their allotment, with full right to use, build upon, clear, improve, and occupy the same in all respects as provided by law. [178]

The plaintiff, as guardian ad litem, excepts to so much of said order as denies an allotment to Edna Weiss, and the exception is allowed; the defendant excepts to so much of said decree as makes any allotment to plaintiffs and the exception is allowed.

Done in open court this 24th day of December A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
(Asst. U. S Attorney)

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Dec 24 1928.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [179]

United States District Court, Western District of Washington, Southern Division.

No. 315-E

VIRGINIA WALKOWSKY, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

STATEMENT OF ADMITTED FACTS.

IT IS HEREBY STIPULATED by and between the plaintiffs and the defendant in the above entitled action that the following facts are admitted by the plaintiffs and defendant as evidence in said case and may be received as such without the necessity of proving them *thru* the medium of witnesses:—

1. That *Kat* Walkowsky, the mother of Virginia Walkowsky, Alvin Walkowsky, Catherine Walkowsky and Edna Weiss, minors, was born September 1, 1874. That her Indian name was Toh-toh-atl, and that she is a full blooded Indian.

2. That Kate Walkowsky was born at Oysterville, Washington, on Shoalwater Bay.

3. That said Kate Walkowsky on January 9, 1893, married John Walkowsky, a white man,

4. That the following are the names of the children and the dates of their birth, which were born to said Kate Walkowsky and John Walkowsky:—

a. Albert Walkowsky, born March 31, 1894.
b. Louise Walkowsky, born August 1, 1895.
c. Frank Walkowsky, born April 9, 1897.
d. Ida Walkowsky, born March 3, 1899.
e. Grace Walkowsky Griggs, born June 28, 1900.
f. Leonard Walkowsky, born October 26, 1904.
g. Rose Walkowsky, born June 16, 1906.
h. Kenneth Walkowsky, born January 19, 1909.
i. Virginia Walkowsky, born August 4, 1912.
j. Alvin Walkowsky, born August 26, 1916.
k. Catherine Walkowsky, born August 26, 1916.

[180]

5. That all of the above named children with the exception of Virginia, Alvin and Catherine Walkowsky, have received allotments upon the Quinaielt Reservation.

7. That the plaintiffs above named, Virginia Walkowsky, Alvin Walkowsky and Catherine Walkowsky, were born to the said Kate Walkowsky and John Walkowsky after the adoption of Kate Walkowsky and her eight children by the Quinaielt tribe of Indians. That the said Kate Walkowsky after the birth of the above-named Catherine Walkowsky separated from the said John Walkowsky and divorced him and married one Robert Weiss, a white man, by whom she had one child, Edna Weiss, one of the plaintiffs above named, born on the 18th day of February 1919.

8. That the mother of Kate Walkowsky was an Indian named Spieten who was a member of the Wy-

nooche band of Indians in the State of Washington. That her father was an Indian named Tath Tohe, and he was a full blooded Chinook Indian.

Dated this 10th day of January, 1928.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for Plaintiffs.

DAVID SPAULDING,
Attorneys for defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, Jan 10 1928

ED. M. LAKIN,
Clerk.
By Lakin. [181]

United States District Court, Western District of Washington, Southern Division.

No. 315-E

VIRGINIA WALKOWSKY, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys

for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and [184] finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties [185] to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same.

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part

approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States. [186]

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a member of the tribal In-

dians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on February 5, 1929, awarding allotments to the plaintiffs herein when the evidence adduced at the time of the trial was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within assignments this 19th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [187]

United States District Court, Western District of Washington, Southern Division.

No. 315-E

VIRGINIA WALKOWSKY, et al,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further Ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [188]

United States District Court, Western District of Washington, Southern Division.

No. 320-E.

MARY BARICHIO PETIT, and NORRIS PETIT, ELLIS A. PETIT, OSCAR BRIGNONE, minors, by PAUL PETIT, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court, Sitting in Equity:

The plaintiffs complain of the defendant, and for cause of action, allege and say:

I.

That the plaintiffs are, and at all times since their birth have been persons of part Indian blood, and members of the Quinaielt tribe of Indians of Grays Harbor County, Washington, within this District, and that the said Paul Petit was duly and in accordance with law appointed guardian ad litem of the plaintiffs, Norris Petit, Ellis A. Petit, and Oscar Brignone, minors, by the above entitled Court upon the 11th day of April 1927, and he duly qualified as such guardian ad litem, and is now acting as such upon the behalf of the minor plaintiffs herein.

II.

That the plaintiff, Mary Barichio Petit is the mother of the said minor children, Norris Petit, and Ellis A. Petit, and is the aunt of the plaintiff Oscar Brignone, that the said Mary Barichio Petit is a Quinaielt Indian by blood, and the wife of said Paul Petit, guardian ad litem named herein, who is a duly enrolled and allotted Indian of the Quinaielt Indian Reservation. [189]. That all of the plaintiffs named herein, were born and reared, and now live in Pacific County, near Bay Center, Washington, within this District, and have always lived associated, and affiliated with the Indians of this locality, and other Quinaielt Indians, and have always been considered as Indians in this locality. That Paul Petit as before stated has recently been allotted upon the said Quinaielt Indian Reservation, and expects to make his home thereon with his family when the land has been cleared and a home established thereon.

III.

That the plaintiffs have many members of their family recognized and allotted upon the said Quinaielt Indian Reservation, among whom as before stated is Paul Petit, the husband of the plaintiff, Mary Barichio Petit, and the father of the plaintiffs, Norris Petit, and Ellis A. Petit. Frank G. Barichio, Quinaielt allottee No. 593 who is the father of the plaintiff, Mary Barichio Petit, and the grandfather of the plaintiffs, Norris Petit, and Ellis A. Petit. Elizabeth Springer, Quinaielt allottee No. 592 who is the grandmother of the plaintiff, Mary Barichio Petit, and the great grandmother of the plaintiff, Norris Petit, and Ellis A. Petit. The plaintiff Mary Barichio Petit has the following named uncle and aunt allotted upon the said Quinaielt Indian Reservation, John Barichio, Quinaielt allottee No. 594, Ellen Springer, Quinaielt allottee No. 595, also a cousin, Henry Franklin, Quinaielt allottee No. 596. That plaintiffs have many other relatives allotted upon the said Quinaielt Indian Reservation on their father's side. [189A]

IV.

That by reason of the relationship of the plaintiffs as herein described, and by reason of the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the said Quinaielt Indian Reservation, these plaintiffs have a common interest in the subject matter of this action, and are affected in a similar manner.

V.

That the ground upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indi-

ans and members of the Quinaielt tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians, and other bands of Indians, and under the allotment acts of the United States, to an allotment of at least 80 acres, each, of land upon the said Quinaielt Indian Reservation in the State of Washington within this District. The jurisdiction of the court further depends upon the Acts of August 15, 1894 (28 Stat. L., 305) as amended by the Act of February 6, 1901 (31 Stat. L., 760) giving the rights to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago, a Special Alloting Agent was sent by the defendant, more particularly the Secretary of the Interior to the said Quinaielt Indian Reservation for the purpose of alloting lands upon the said Reservation to Indians entitled thereto, and said plaintiffs in due course and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Reservation, which said selections for allotment are [190] described in words and figures as follows to-wit:

Mary Barichio Petit—N/2 NE/4 Sec 8 T 22 N R 11 W W M in Washington.

Norris Petit—E/2 NW/4 Sec 16 T 22 N R 11 W W M in Washington

Ellis A. Petit—N/2 NW/4 Sec 8 T 22 N R 11 W W M in Washington

Oscar Brignone—E/2 NE/4 Sec 7 T 22 N R 11 W W M in Washington.

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington D. C. in accordance with law, and each and every *dtep* was regularly completed for the actual approval and granting said allotments and the issuance of the necessary patents therefor, except only the approval of the Secretary of the Interior. That recently the defendant, more particularly the Secretary of the Interior, and the Commissioner of Indian Affairs, neglected refused, and declined to allot said plaintiffs the identical allotments herein described or any allotment of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of the plaintiffs rights to an allotment was for no reason known to the plaintiffs and is an arbitrary action and in no manner justified, and is a denial of a right of said plaintiffs as set forth *ny* the acts of Congress of United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs herein are unallotted, unimproved, vacant Indian lands [191] capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all of the facts hereinbefore alleged, defendant, its officers and agents, have wrong-

fully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded and still deny and exclude plaintiffs herein from said lands, and have refused and still refuse to allow said plaintiffs to go upon or reside upon said lands or any portion thereof.

X.

That plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them, and that their rights be recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE plaintiffs pray judgment as follows:

L.

That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified to the Secretary of the Interior, and that plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and [192] improve said lands as their homes; in all respects as provided by law.

II.

That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for Plaintiffs.

State of Washington,
County of Pacific,—ss.

MARY BARICHIO PETIT, being first duly sworn on oath deposes and says that she is one of the plaintiffs in the above entitled action, that she has read the foregoing bill of complaint, knows the contents thereof, and that the same is true as she verily believes.

MARY BARICHIO PETIT.

Subscribed and sworn before me this 7th day of March, 1927.

[Notary Seal] F. G. McINTOSH,

Notary Public in and for the State of Washington, residing at South Bend, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, April 11, 1927.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [193]

United States District Court, Western District of Washington, Southern Division.

No. 320-E.

MARY BARICHIO PETIT, and NORRIS PETIT, ELLIS A. PETIT, OSCAR BRIGNONE, minors, by PAUL PETIT, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER.

Comes now the above named defendant by its attorney, and by way of answer to plaintiffs' bill of complaint, admits, denies and alleges as follows.

I.

Referring to Paragraph I of plaintiffs' bill of complaint, defendant denies that plaintiffs are members of the Quinaielt tribe of Indians, and admits each and every other material allegation therein contained.

II.

Referring to Paragraph II defendant denies each and every material allegation contained therein.

III.

Referring to paragraph III defendant denies each and every material allegation therein contained.

IV.

Referring to paragraph IV defendant denies the same.

V.

Referring to paragraph V defendant admits the jurisdiction of this Court and denies each and every other allegation therein contained. [194]

VI.

Referring to paragraph VI defendant admits that a Special Allotting Agent was sent to said Quinaielt Indian Reservation for the purpose of allotting lands to Indians entitled thereto, and denies each and every other material allegation therein contained.

VII.

Referring to paragraph VII of plaintiffs' bill of complaint defendant denies the same.

VIII.

Referring to paragraph VIII defendant admits that the lands described in paragraph VI of plaintiff's bill of complaint are surveyed, unallotted, unimproved, vacant Indian lands, and subject to selection and allotment under the laws of the United States.

IX.

Referring to paragraph IX defendant admits that it has refused to allot lands to the plaintiffs herein, but denies that said refusal is wrong.

X.

Referring to paragraph X defendant denies the same.

WHEREFORE, having answered plaintiffs' bill of

complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and *says*: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and [195] on behalf of the United States of America, defendant herein; that he has read the foregoing Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of November, 1927.

[Seal] ALINE ESLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, Nov. 11, 1927.

ED. M. LAKIN,
Clerk.

By E. R.,
Deputy. [196]

In the United States District Court for the Western District of Washington, Southern Division.

No. 320-E.

MARY BARICHIO PETIT, and NORRIS PETIT, ELLIS A. PETIT, OSCAR BRIGNONE, minors, by PAUL PETIT, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Mary Barichio Petit, and Norris Petit, Ellis A. Petit, Oscar Brignone, minors, by Paul Petit, Guardian ad litem, appearing by their counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the Court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the Court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED: That plaintiffs Mary Barichio Petit, and Norris Petit, Ellis A. Petit, and Oscar Brignone, minors, be and they are hereby entitled to the lands heretofore

selected by them, situate upon the Quinaielt Indian Reservation, within [197] this District, in Grays Harbor County, in the State of Washington, to-wit:

Mary Bariehio Petit—The North half of the Northeast quarter of Section Eight (8), Township Twenty-two (22) North, Range Eleven (11) West, of the Willamette Meridian, in the State of Washington.

Norris Petit—The East half of the Northwest quarter of Section Sixteen (16), Township Twenty-two (22) North, Range Eleven (11) West, of the Willamette Meridian, in the State of Washington.

Ellis A. Petit—The North half of the Northwest quarter of Section Eight (8), Township Twenty-two (22) North, Range Eleven (11) West, of the Willamette Meridian, in the State of Washington.

Oscar Brignone—The East half of the Northeast quarter of Section Seven (7), Township Twenty-two (22) North, Range Eleven (11) West, of the Willamette Meridian, in the State of Washington.

as allotments to be held and owned by each of said plaintiffs respectively, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents be and they are hereby ordered and directed to issue to each of the said plaintiffs, certificates of al-

lotment of said land so allotted to them, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be, and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns are not entitled to said lands as and for their allotments, with full right to use, build upon, clear, [198] improve, and occupy the same, in all respects as provided by law; to all of which defendants excepts and its exception is allowed.

Done in open court this 24th day of December A. D., 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [199]

United States District Court, Western District of Washington, Southern Division.

No. 320-E.

MARY BARICHIO PETIT, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and [202] finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands alloted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911,

expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties [203] to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same.

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said Council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children

of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States. [204]

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a member of the tribal Indians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on February 5, 1929, awarding allotments to the plaintiffs herein when the evidence adduced at the time of the trial was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of allot-

ment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, March 20, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [205]

United States District Court, Western District of Washington, Southern Division.

No. 320-E

MARY BARICHIO PETIT, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On application of the defendant herein it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March, 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, March 20, 1929.

ED. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [206]

United States District Court, Western District of Washington, Southern Division.

No. 321-E.

DEWEY BARICHIO, and LEDA E. BARICHIO, ROMIE D. BARICHIO, ANDREW B. BARICHIO, Minors, by VINIE WILSON BARICHIO, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court, Sitting in Equity:

The plaintiffs complain of the defendant, and for cause of action allege and say:

I.

That the plaintiffs are and at all times since their birth have been persons of part Indian blood, and members of the Quinaielt tribe of Indians of Grays Harbor County, Washington, within this District, and that the said Vinie Wilson Barichio was duly and in

accordance with law appointed guardian ad litem of the plaintiffs, Leda E. Barichio, Romie D. Barichio, and Andrew B. Barichio, minors, by the above entitled Court upon the 11th day of April 1927, and she duly qualified as such guardian ad litem, and is now acting as such upon the *behelf* of the minor plaintiffs herein.

II.

That the plaintiff, Dewey Barichio above named is the father of the said minor plaintiffs, Leda E., Romie D. and Andrew B. Barichio, and that the said Dewey Barichio is a Quinaielt Indian by blood. That the mother of the said minor plaintiffs, and the wife of the said plaintiff, Dewey [207] Barichio, namely Vinie Wilson Barichio, the guardian ad litem herein is a duly enrolled and allotted Quinaielt Indian. That all of the plaintiffs named herein, were born and reared and now live in Pacific County near Bay Center Washington, within this District, and have always lived, associated, and affiliated with the Indians of this district, and other Quinaielt Indians and have never been considered except as Indians in this locality. That Vinie Wilson Barichio as before stated has been recently allotted upon the said Quinaielt Indian Reservation, and expects to make her home thereon with her family when the land has been cleared and a home established thereon.

III.

That the plaintiffs have many members of their family allotted upon the said Quinaielt Indian Reservation, among whom is as before stated, Vinie Wilson Barichio who is the wife of the plaintiff, Dewey Barichio, and the mother of the plaintiffs,

Leda E. Romie D. and Andrew B. Barichio. Frank G. Barichio Quinaielt allottee No. 593 who is the father of the said Dewey Barichio and the grandfather of the said Leda E. Barichio, Romie D. Barichio, and Andrew B. Barichio. That defendant has recognized and allotted many other members of the plaintiffs family upon the said Quinaielt Indian Reservation.

IV.

That by reason of the relationship of the plaintiffs as above described, and by reason of the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the said Quinaielt Indian Reservation, these plaintiffs have a common interest [208] in the subject matter of this action and are affected in a similar manner.

V.

That the ground upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians, and other bands of Indians and under the allotment acts of the United States, to an allotment of at least 80 acres, each, of land upon the said Quinaielt Indian Reservation in the State of Washington within this District. The jurisdiction further depends upon the Acts of August 15, 1894 (28 Stat. L., 305), as amended by the Act of February 6, 1901 (31 Stat. L., 760), giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago a Special Alloting Agent was sent by the defendant, more particularly the Secretary of the Interior to the said Quinaielt Indian Reservation for the purpose of alloting lands upon the said reservation to Indians entitled thereto, and said plaintiffs in due course, and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt reservation, which said selections for allotments are described in words and figures as follows to-wit:

Dewey Barichio—W/2 NE/4 Sec 28 T 22 N R 12 W W M in Washington.

Leda E. Barichio—E/2 SW/4 Sec 14 T 23 N R 11 W W M in Washington

Romie D. Barichio—Lot 3, and NE/4 SW/4 Sec 7 T 22 N R 11 W W M in Washington

Andrew B. Barichio—Lot 1 and SE/4 NE/4 Sec 2 T 21 N R 11 W W M in Washington.

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington D. C. in accordance with law, and each and every step was regularly completed for the actual approval and granting said allotments and the issuance of the necessary patents therefor, except only the approval of the Secretary of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected, refused and declined to allot said plaintiffs the identical allot-

ments herein described or any allotment of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of the plaintiffs rights to an allotment was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States. [210]

IX.

That notwithstanding all of the facts hereinbefore alleged, defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude plaintiffs herein from said lands and have refused and still refuse to allow said plaintiffs to go upon or reside upon said lands or any portion thereof.

X.

That said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them and that their rights be

recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

Wherefore plaintiffs pray judgment as follows:

I.

That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified to the Secretary of the Interior, and that plaintiffs be awarded said lands *ad* their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said lands as their homes, in all respects as provided by law.

II.

That the plaintiffs have all other and further relief as is equitable and just. [211]

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for Plaintiffs.

State of Washington,
County of Pacific,—ss.

DEWEY BARICHIO, being first duly sworn on oath deposes and says that he is one of the plaintiffs in the above entitled action, that he has read the fore-

going bill of complaint, knows the contents thereof, and that the same is true as he verily believes.

DEWEY BARICHIO.

Subscribed and sworn before me this *4* day of March 1927.

[Notary Seal] GEO. J. DEVER,

Notary Public in and for the State of Washington, residing at So. Bend, Wn.

Notary Public in and for the State of Washington, residing at South Bend.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, April 11, 1927.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [212]

United States District Court, Western District of Washington, Southern Division.

No. 321-E.

DEWEY BARICHIO, and LEDA E. BARICHIO, ROMIE D. BARICHIO, ANDREW B. BARICHIO, Minors, by VINIE WILSON BARICHIO, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER.

Comes now the above named defendant by its attorney, and by way of answer to plaintiffs' bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiffs' bill of complaint, defendant denies that plaintiffs are members of the Quinaielt tribe of Indians; defendant admits every other material allegation contained therein.

II.

Referring to paragraph II, defendant denies every material allegation contained therein.

III.

Referring to paragraph III, defendant admits every material allegation contained therein.

IV.

Referring to paragraph IV, defendant denies the same.

V.

Referring to paragraph V, defendant admits the jurisdiction of the above entitled Court, and denies each and every other material allegation contained therein. [213]

VI.

Referring to paragraph VI, defendant admits that a Special Allotting Agent was sent to the Quinaielt Indian Reservation for the purpose of allotting lands upon said Reservation to the Indians entitled thereto;

defendant denies every other material allegation contained therein.

VII.

Referring to paragraph VII, defendant denies each and every material allegation contained therein.

VIII.

Referring to paragraph VIII, defendant admits that the lands referred to in paragraph VI of plaintiff's bill of complaint are surveyed, unallotted, unimproved, vacant Indian lands, subject to selection and allotment under the laws of the United States.

IX.

Referring to paragraph IX, defendant admits that it has refused to allot the said lands to the plaintiff herein, but denies that said refusal is wrongful.

X.

Referring to paragraph X, defendant denies the same.

WHEREFORE, having answered plaintiff's bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney. [214]

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn on oath, deposes and says: That he is an Assistant

United States Attorney for the Western District of Washington and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of November, 1927.

[Seal] ALINE ESLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 9, 1927.

ED. M. LAKIN,
Clerk.

By E. R.,
Deputy. [215]

In the United States District Court for the Western District of Washington, Southern Division.

No. 321-E.

DEWEY BARICHIO, and LEDA E. BARICHIO, ROMIE D. BARICHIO, ANDREW B. BARICHIO, Minors, by VINIE WILSON BARICHIO, Guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Dewey Barichio, and Leda E. Barichio,

Romie D. Barichio, Andrew B. Barichio, minors, by Vinie Wilson Barichio, Guardian ad litem, appearing by their counsel Stuart H. Elliott and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the Court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the Court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Dewey Barichio, and Leda E. Barichio Romie D. Barichio and Andrew B. Barichio, minors, be and they are hereby entitled to the lands heretofore selected by them, situate upon the Quinaielt Indian Reservation, within [216] this district, in Grays Harbor County, in the State of Washington, to-wit:

Dewey Barichio—The West half of the Northeast quarter of Section Twenty-eight (28), Township Twenty-two (22) North, Range Twelve (12) West of the Willamette Meridian, in the State of Washington.

Leda E. Barichio—The east half of the Southwest quarter of Section Fourteen (14), Township Twenty-three (23) North, Range Eleven (11), West, of the Willamette Meridian, in the State of Washington.

Romie D. Barichio—Lot Three (3), and the

Northeast quarter of the Southwest quarter of Section Seven (7), Township Twenty-two (22) North, Range Eleven (11) West, of the Willamette Meridian, in the State of Washington.

Andrew B. Barichio—Lot 1 and the *Woutheast* quarter of the Northeast quarter of Section Two (2) Township Twenty-one (21) North, Range Eleven (11) West, of the Willamette Meridian, in the State of Washington.

as allotments to be held and owned by each of said plaintiffs respectively, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents be and they are hereby ordered and directed to issue to each of the said plaintiffs, certificates of allotment of said land so allotted to them, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns, are not entitled to said lands as and for their [217] allotments, with full right to use, build upon, clear, improve, and occupy the same, in all respects as

provided by law; to all of which defendant excepts and its exception is allowed.

Done in open court this 24th day of December, A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1928.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [218]

United States District Court, Western District of Washington, Southern Division.

No. 321-E

DEWEY BARICHIO, et al,
Plaintiffs,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. Mc-

Cutcheon and Tom DeWolfe, Assistant United States Attorney for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of [221] America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties [222] to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same.

VII.

That the District Court erred in holding and findfinding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the

fact that said proceedings of said council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States. [223]

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897,

and not then recognized as a member of the tribal Indians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on February 5, 1929, awarding allotments to the plaintiffs herein when the evidence adduced at the time of the trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, *Northern* Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [224]

United States District Court, Western District of Washington, Southern Division.

No. 321-E

DEWEY BARICHIO, et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and Decree heretofore entered and filed herein on the 24th day of December, 1928, be, and the same is hereby allowed.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE in open court this 20th day of March, 1929.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [225]

United States District Court, Western District of Washington, Southern Division.

No. 324-E

EDNA MAY ELLIOTT: RUTH G. ELLIOTT: WILLIAM H. ELLIOTT; JOHN G. ELLIOTT: and FRANK L. ELLIOTT and JEWELL M. ELLIOTT by WILLIAM A. ELLIOTT, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court, Sitting in Equity:—

The plaintiffs complain of the defendant, and for cause of action allege and say: —

I.

That the plaintiffs are and at all times since their birth have been persons of part Indian blood, and members of the Quinaielt Tribe of Indians of Grays Harbor County, Washington, within this District; that the above named Frank L. Elliott and Jewell M. Elliott are minors and that the said William A. Elliott was duly and in accordance with law appointed guardian ad litem of said plaintiffs by the above entitled court on the 14th day of June 1927, and he duly qualified as such and is now acting as such guardian ad litem upon behalf of said plaintiffs.

II.

That the father of said plaintiffs is named William A. Elliott and he is a duly enrolled and allotted Indian of the Quinaielt Indian Reservation in Washington, and all of the plaintiffs herein were born and reared in Wahkiakum County, [226] Washington, within this District at the Indian settlement Dahlia in said county. That the said William A. Elliott and all of the plaintiffs herein have at all times since their birth continuously lived as Indians and associated and affiliated with the Quinaielt Indians and associated and affiliated tribes and bands of Indians, and are fish eating Indians of the Pacific Coast.

III.

That the defendant has recognized many members of plaintiffs' family and has enrolled and allotted many members of said family, among whom are: the father of the plaintiffs, William A. Elliott, the paternal grandmother Agnes Elliott, the paternal

uncles and aunts, J. H. Elliott, George R. Elliott, J. Grant Elliott, Edmund C. Elliott, Charles G. Elliott, Louise E. Henry, Eliza L. Miles and Grace Heiner.

IV.

That the plaintiffs, as above set forth, are full blood brothers and sisters and that by reason thereof and the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation, under respectively the same conditions and like circumstances, these plaintiffs have a common interest in the subject matter of this action and are affected in a similar manner.

V.

That the grounds upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt Tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the allotment acts of the United States, to an allotment of at least 80 acres, each, of land upon the said Quinaielt Indian Reserva- [227] tion in the State of Washington within this District. The jurisdiction of the Court further depends upon the Acts of August 15, 1894, 28 Stats. L., 305, as amended by the Act of February 6, 1901, 31 Stats. L. 760, giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago a Special Allotting Agent was sent by the defendant, more particularly the Secretary of the Interior, to said Quinaielt Indian Reservation for the purpose of allotting lands upon said reservation to Indians entitled thereto, and that said special alloting agent is at this time engaged in alloting lands to those entitled thereto; and said plaintiffs in due course and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Reservation, which said selections for allotments are described in words and figures as follows, towit:—

Edna May Elliott,—E/2 SE/4 Sec. 30, T. 23 N., R. 12 W., W. M.

Ruth G. Elliott,—W/2 SE/4 Sec. 30, T. 23 N., R. 12 W., W. M.

William H. Elliott,—E/2 NE/4 Sec. 30, T. 23 N., R. 12 W., W. M.

John G. Elliott,—W/2 NE/4 Sec. 30, T. 23 N., R. 12 W., W. M.

Frank L. Elliott,—W/2 NW/4 Sec. 30, T. 23 N., R. 12 W., W. M.

Jewel M. Elliott,—E/2 NW/4 Sec. 30, T. 23 N., R. 12 W., W. M.

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval

and granting of said allotments and the issuance of the necessary patents therefor except only the approval of the Secretary [228] of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected, refused and declined to allot to said plaintiffs the identical allotments herein described or any allotments of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of plaintiffs' rights to allotments was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason, and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the Acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all the facts hereinbefore alleged, defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude plaintiffs herein from said lands, and have refused

and still refuse to let plaintiffs go upon or reside upon said lands or any portion thereof.

X.

That said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be [229] allotted to them and that their rights be recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE, plaintiffs pray judgment as follows:—

1. That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said lands as their homes, in all respects as provided by law.

2. That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for plaintiffs.

State of Washington,
County of Grays Harbor,—ss.

William A. Elliott being first duly sworn on oath

deposes and says: That he is the duly appointed and qualified guardian ad litem of Frank L. Elliott and Jewell M. Elliott, plaintiffs above named, and makes this verification for and on behalf of said minors as such guardian ad litem; that he has read and knows the contents of the foregoing Bill of Complaint and that the statements therein contained are true as he verily believes.

WILLIAM A. ELLIOTT.

Subscribed and sworn to before me this 7th day of June, 1927.

[Notary Seal] LULA LIVINGSTON,

Notary Public in and for the State of Washington, residing at Aberdeen.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jun 14, 1927.

ED. M. LAKIN,
Clerk.

By E. M. L.,
Deputy. [230]

United States District Court, Western District of Washington, Southern Division.

No. 324-E

EDNA MAY ELLIOTT; RUTH G. ELLIOTT; WILLIAM H. ELLIOTT; JOHN G. ELLIOTT; and FRANK L. ELLIOTT and JEWELL M. ELLIOTT by WILLIAM A. ELLIOTT, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER.

Comes now the above named defendant by its attorney, and by way of answer to plaintiffs' bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiffs' bill of complaint, defendant denies that plaintiffs are members of the Quinaielt Tribe of Indians; admits that said William A. Elliott was duly and in accordance with law appointed guardian ad litem of said plaintiffs by the above entitled court on the 14th day of June, 1927, and for lack of information, knowledge or belief, denies each and every other allegation therein contained.

II.

Referring to paragraph II, defendant admits that William A. Elliott is an enrolled and allotted Indian of the Quinaielt Indian Reservation in Wash-

ington; defendant admits each and every other material allegation contained therein.

III.

Referring to paragraph III, defendant admits the same. [231]

IV.

Referring to paragraph IV, the defendant not having sufficient knowledge or information, denies the same.

V.

Referring to paragraph V, defendant admits this Court's jurisdiction of plaintiffs; defendant denies each and every other material allegation therein contained.

VI.

Referring to paragraph VI, defendant admits that a Special Allotting Agent was sent to said Quinaielt Indian Reservation by the defendant for the purpose of allotting lands upon said Reservation to Indians entitled thereto; defendant denies each and every other material allegation contained therein.

VII.

Referring to paragraph VII, defendant admits that the said Commissioner of Indian Affairs has refused to allot lands to these plaintiffs; defendant denies each and every other material allegation contained therein.

VIII.

Referring to paragraph VIII, defendant admits that the lands described in paragraph VI or para-

graph VIII of plaintiffs' bill of complaint are unallotted, surveyed, unimproved, vacant Indian lands, subject to selection under the laws of the United States.

IX.

Referring to paragraph *Ix*, defendant admits that it has refused to allot the said lands to the plaintiffs, but denies that such action is wrongful.

X.

Referring to paragraph X, defendant denies each and every allegation therein contained.

WHEREFORE, having answered plaintiff's bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein. [232]

THOS. P. REVELLE,
United States Attorney.
DAVID L. SPAULDING,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing

Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of November, 1927.

[Seal] ALINE *ESTER,*

Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov 9 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [233]

United States District Court, Western District of Washington, Southern Division.

No. 324-E

EDNA MAY ELLIOTT, et al.

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto that the following cases may be assigned by the Court for trial for the 27th day of December, 1927, at ten o'clock A. M., and heard in connection with other Indian allotment

cases in which the relatives of Edna May Elliott, et al, are involved, for the reason that said cases can be tried advantageously together and it will save large amounts of costs and much time of the Court:—

No. 324-E, Edna May Elliott, et al, v. United States,

No. 314-E, Lizzie Rolfson, et al, v. United States,

No. 325-E, Charles S. Elliott, Jr., et al. v. United States,

No. 321-E Dewey *Narichio,* et al, v. United States,

No. 320-E Mary Barichio Petit, et al, v. United States

No. 326-E Agnes Rubens, et al, v. United States,

No. 313-E, Bertha Evelyn Payne v. United States.

DATED this 6th day of December, 1927.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for plaintiffs.

JOHN T. McCUTCHEON,
Attorneys for defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, Dec 6 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [234]

In the United States District Court for the Western District of Washington, Southern Division.

No. 324-E

EDNA MAY ELLIOTT; RUTH G. ELLIOTT; WILLIAM H. ELLIOTT; JOHN G. ELLIOTT; and FRANK L. ELLIOTT and JEWELL M. ELLIOTT, by WILLIAM A. ELLIOTT, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Edna May Elliott, Ruth G. Elliott, William H. Elliott and John G. Elliott appearing personally, and the plaintiffs Frank L. Elliott and Jewell M. Elliott, minors, appearing by their guardian ad litem William A. Elliott, and all of the plaintiffs appearing by their counsel Stuart H. Elliott, and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. District Attorney, Tacoma, James T. Rahily Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the

court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED: That plaintiffs Edna May Elliott, Ruth G. Elliott, William H. Elliott, John G. Elliott, Frank L. Elliott and [235] Jewell M. Elliott be and they are hereby entitled to the lands heretofore selected by them, situate upon the Quinaielt Indian Reservation, within this District, in Grays Harbor County, in the State of Washington, to-wit:

Edna May Elliott—The East half of the Southeast quarter of Section Thirty (30), Township Twenty-three (23) North, Range Twelve (12) West, Willamette Meridian.

Ruth G. Elliott—The West half of the Southeast quarter of Section Thirty (30), Township Twenty-three (23) North, Range Twelve West, Willamette Meridian.

William H. Elliott—The East half of the Northeast quarter of Section Thirty (30), Township Twenty-three (23) North, Range Twelve (12) West, Willamette Meridian.

John G. Elliott—The West half of the Northeast quarter of Section Thirty (30), Township Twenty-three (23) North, Range Twelve (12) West, Willamette Meridian.

Frank L. Elliott—The West half of the Northwest quarter of Section Thirty (30), Township Twenty-three (23) North, Range Twelve (12) West, Willamette Meridian.

Jewell M. Elliott—The East half of the Northwest quarter of Section Thirty (30), Town-

ship Twenty-three (23), North, Range Twelve (12) West, Willamette Meridian

as allotments to be held and owned by said plaintiffs, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiffs, certificates of allotment of said lands heretofore described, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons [236] claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators, and assigns, are not entitled to said land as and for their allotment, with full right to use, build upon, clear, improve and occupy the same in all respects as provided by law; to all of which the defendant excepts and its exception is allowed.

Done in open court this 24th day of December A. D., 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
(Asst. U. S. Attorney).

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Dec 24 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [237]

United States District Court, Western District of Washington, Southern Division.

No. 324-E

EDNA MAY ELLIOTT, et al.

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorney for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments

of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District Court erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of [240] America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the de-

fendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties [241] to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and signed the same.

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that

time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States. [242]

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a member of the tribal Indians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on February 5, 1929, awarding allotments to the plaintiffs herein when the evidence adduced at

the time of the trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignments this 19th day of March 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [243]

United States District Court, Western District of Washington, Southern Division.

No. 324-E

EDNA MAY ELLIOTT, et al.

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be, and the same is hereby allowed.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE in open court this 20th day of March, 1929.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Received a copy of the within Order this 20th day of Mar 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for plaintiffs.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Mar 20 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [244]

United States District Court, Western District of Washington, Southern Division.

No. 325-E

CHAS. G. ELLIOTT, Jr., ANNA MARIE ELLIOTT, HENRY ELLIOTT, RALPH G. ELLIOTT, and FRANCES ELLIOTT, Minors, by CHAS. G. ELLIOTT, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court, Sitting in Equity:—

The plaintiffs complain of the defendant, and for cause of action allege and say:—

I.

That the plaintiffs are and at all times since their birth have been persons of part Indian blood, and members of the Quinaielt Tribe of Indians of Grays

Harbor County, Washington, within this District; that all the above named plaintiffs are minors and that the said Chas. G. Elliott was duly and in accordance with law appointed guardian ad litem of said plaintiffs by the above entitled court on the 14th day of June 1927, and he duly qualified as such and is now acting as such guardian ad litem upon behalf of said plaintiffs.

II.

That the father of said plaintiffs is named Chas. G. Elliott and he *isaduly* enrolled and allotted Indian of the Quinaielt Indian Reservation in Washington, and all of the plaintiffs herein were born and reared in Wahkiakum County, Wash- [245] ington, within this District, and now reside therein at the Indian settlement Dahlia in said County. That the said Chas. G. Elliott and all of the plaintiffs herein have at all times since their birth continuously lived as Indians and associated and affiliated with the Quinaielt Indians and associated and affiliated tribes and bands of Indians, and are fish eating Indians of the Pacific Coast.

III.

That the defendant has recognized many members of plaintiffs' family and has enrolled and allotted many members of said family, among whom are: the father of the plaintiffs, Chas. G. Elliott, the paternal grandmother Agnes Elliott, the paternal uncles and aunts, J. H. Elliott, George R. Elliott, J. Grant El-

liott, Edmund C. Elliott, William A. Elliott, Louise E. Henry, Eliza L. Miles and Grace Heiner.

IV.

That the plaintiffs, as above set forth, are full blood brothers and sisters and that by reason thereof and the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation, under respectively the same conditions and like circumstances, these plaintiffs have a common interest in the subject matter of this action and are affected in a similar manner.

V.

That the grounds upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt Tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under the [246] allotment acts of the United States, to an allotment of at least 80 acres, each, of land upon the said Quinaielt Indian Reservation in the State of Washington within this District. The jurisdiction of the Court further depends upon the Acts of August 15, 1894, 28 Stat. L., 305, as amended by the Act of February 6, 1901, 31 Stat. L., 760, giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago a Special Alloting Agent was sent by the defendant, more particularly the Sec-

retary of the Interior, to said Quinaielt Indian Reservation for the purpose of alloting lands upon said reservation to Indians entitled thereto, and that said special alloting agent is at this time engaged in alloting lands to those entitled thereto; and said plaintiffs in due course and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Reservation, which said selections for allotments are described in words and figures as follows, towit:—

Chas. G. Elliott, Jr.,—W/2 SE/4 Sec 11 T 22 N, R 13 W, W. M.

Anna Marie Elliott,—W/2 NW/4 Sec 12 T 22 N, R 13 W, W. M.

Henry Elliott,—E/2 SW/4 Sec 12 T 22 N, R 13 W, W. M.

Ralph G. Elliott,—E/2 SE/4 Sec 12 T 22 N, R 13 W, W. M.

Frances Elliott,—E/2 SW/4 Sec 13 T 22 N, R 13 W, W. M.

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval [247] and granting of said allotments and the issuance of the necessary patents therefor except only the approval of the Secretary of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected, refused and declined to allot to

said plaintiffs the identical allotments herein described or any allotments of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of plaintiffs' rights to allotments was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed by the United States Government and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all the facts hereinbefore alleged, defendant, its officers and agents, have wrongfully failed, neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude plaintiffs herein from said lands, and have refused and still refuse to let plaintiffs go upon or reside upon said lands or any portion thereof. [248]

X.

That said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that

the same be allotted to them and that their rights be recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE, plaintiffs pray judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve said lands as their homes, in all respects as provided by law.

2. That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for plaintiffs.

State of Washington,
County of Pacific,—ss.

Chas. G. Elliott being first duly sworn on oath deposes and says: That he is the duly appointed and qualified guardian ad litem of the plaintiffs above named and makes this verification for and on behalf of said minors as such guardian ad litem; that he has read and knows the contents of the foregoing Bill

of Complaint and that the statements therein contained are true as he verily believes.

CHAS. G. ELLIOTT.

Subscribed and sworn to before me this 20 day of April, 1927.

[Notary Seal] J. W. MATTSON,
Notary Public in and for the State of Washington, residing at Tacoma, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jun 14, 1927.

ED. M. LAKIN,
Clerk.
By E. M. L.,
Deputy. [249]

United States District Court, Western District of Washington, Southern Division.

No. 325-E

CHAS. G. ELLIOTT, Jr., ANNA MARIE ELLIOTT, HENRY ELLIOTT, RALPH G. ELLIOTT, and FRANCES ELLIOTT, Minors, by CHAS. G. ELLIOTT, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER.

Comes now the above named defendant, by its attorneys, and answering the plaintiffs' Bill of Complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of said Bill of Complaint, defendant denies that the plaintiffs are members of the Quinaielt Tribe of Indians; admits that said Chas. G. Elliott was duly and in accordance with law appointed guardian ad litem of said plaintiffs by the above entitled court on the 14th day of June, 1927, and for lack of information, knowledge or belief, denies each and every other allegation therein contained.

II.

Answering paragraph II of plaintiffs' Bill of Complaint, the defendant admits that Chas G. Elliott was enrolled and allotted land on the Quinaielt Reservation in Washington, by the decree of the United States District Court for the Western District of Washington, Southern Division, and the defendant denies that Dahlia is an Indian Settlement. Defendant denies each and every other material allegation [250]

III.

In answer to paragraph III of said Complaint, defendant admits the same.

IV.

For answer to paragraph IV, the defendant has not sufficient information, knowledge or belief, and therefore denies the same.

V.

For answer to paragraph V of plaintiffs' Bill of Complaint, the defendant denies that plaintiffs are

members of the Quinaielt Tribe of Indians, or are members of other Tribes of Indians, entitled under the Treaty made and entered into between the United States and the Quinaielt Indians, and denies that the plaintiffs are entitled to the allotments under said Treaty. Defendant admits all other material allegations contained therein.

VI.

In answer to paragraph VI of said Bill of Complaint, the defendant admits that a special allotting agent was sent to said Quinaielt Indian Reservation for the purpose of allotting lands upon said reservation to Indians entitled thereto. The defendant denies each and every other allegation contained therein.

VII.

In answer to paragraph VII, the defendant denies each and every material allegation contained therein.

VIII.

In answer to paragraph VIII of plaintiffs' Bill of Complaint, the defendant admits the same to be true. [251]

IX.

In answer to paragraph IX of plaintiffs' Bill of Complaint, defendant admits the acts alleged therein, but denies that said acts are wrongful.

X.

Answering paragraph X of plaintiffs' Bill of Complaint, defendant denies that plaintiffs are entitled to have said lands selected by them or allotted to them. The defendant admits the plaintiffs' desire that the same be allowed to them. The defendant

denies the plaintiffs' desire to go upon, live upon, cultivate and improve said lands as their home.

WHEREFORE having answered plaintiffs' Bill of Complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

THOS. P. REVELLE,
United States Attorney.
DAVID L. SPAULDING,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn on oath, deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing answer; knows the contents thereof, and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 7th day of November, 1927.

[Seal] ALINE LSLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov 11 1927.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [252]

In the United States District Court for the Western District of Washington, Southern Division.

No. 325-E

CHAS. G. ELLIOTT, Jr., ANNA MARIE ELLIOTT, HENRY ELLIOTT, RALPH G. ELLIOTT, and FRANCES ELLIOTT, Minors, by CHAS. G. ELLIOTT, guardian ad litem,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Chas. G. Elliott, Jr., Anna Marie Elliott, Henry Elliott, Ralph G. Elliott and Frances Elliott, minors, by Chas. G. Elliott, guardian ad litem, appearing personally, and by their counsel Stuart H. Elliott and H. G. and Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst. U. S. Dist. Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs Chas. G. Elliott, Jr., Anna Marie Elliott, Henry Elliott, Ralph G. Elliott and Frances Elliott, Minors, be and they are hereby entitled to the lands [253] *lands* heretofore selected by them, situate upon the Quinaielt Indian Reservation, within this District, in Grays Harbor County, in the State of Washington, to-wit:

Chas. G. Elliott Jr.,—The West half of the Southeast Quarter of Section Eleven (11), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian.

Anna Marie Elliott—The West half of the Northwest quarter of Section Twelve (12), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian.

Henry Elliott—The East half of the Southwest quarter of Section Twelve (12), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian.

Ralph G. Elliott—The East half of the Southeast quarter of Section Twelve (12), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian.

Frances Elliott—The East half of the Southwest quarter of Section Thirteen (13), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian

as allotments to be held and owned by each of said plaintiffs, respectively, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents be and they are hereby ordered and directed to issue to each of the said plaintiffs, certificates of allotment of said land so allotted to them, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns, are not entitled to said lands as and for their [254] allotments, with full right to use, build upon, clear, improve, and occupy the same, in all respects as provided by law; to all of which defendant excepts and its exception is allowed.

Done in open court this 24th day of December A. D. 1928.

EDWARD E. CUSHMAN.

[Endorsed]: O. K. as to form.

D. SPAULDING,
(Asst. U. S. Attorney).

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec 24 1928.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [255]

United States District Court, Western District of Washington, Southern Division.

No. 325-E.

CHAS. G. ELLIOTT, JR., et al., Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District *Coyrt* erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of [258] America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plaintiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and [259] signed the same.

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members was in itself authoritative, notwithstanding the fact that said proceedings of said council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and find-

ing that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior [260] to 1897 between a white man and a woman of Indian blood who was living on June 7, 1897, and not then recognized as a member of the tribal Indians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on February 5, 1929, awarding allotments to the plaintiffs herein when the evidence adduced at the time of the trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. McCUTCHEON,
Assistant United States Attorney.
TOM DE WOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within Assignment this 19th day of March, 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, May 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [261]

United States District Court, Western District of Washington, Southern Division.

No. 325-E.

CHARLES G. ELLIOTT, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER ALLOWING APPEAL

On the application of the defendant herein it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed herein on the 24th day of December, 1928, be and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all

proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March, 1929.

STUART H. ELLIOTT &
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [262]

United States District Court, Western District of Washington, Southern Division.

No. 326-E

AGNES RUBENS; LOUISE HENRY PETERSON; MARY HENRY HAGEN; CHRIS HENRY, JR.; and CHRISTINE HENRY and JUNE HENRY, Minors, by LOUISE E. HENRY, Guardian ad litem,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the Above Entitled Court, Sitting in Equity:—

The plaintiffs complain of the defendant, and for cause of action allege and say:—

I.

That the plaintiffs are and at all times since their birth have been persons of part Indian blood, and members of the Quinaielt Tribe of Indians of Grays Harbor County, Washington, within this District; that the above named plaintiffs Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, and Chris Henry, Jr., are over the age of twenty-one years; that plaintiffs Christine Henry and *June Henry* are minors and that the said Louise E. Henry was duly and in accordance with law appointed guardian ad litem of said plaintiffs by the above entitled court on the 14th day of June, 1927, and she duly qualified as such and is now acting as such guardian ad litem upon behalf of said plaintiffs. [263]

II.

That the mother of said plaintiffs is named Louise E. Henry and she is a duly enrolled and allotted Indian of the Quinaielt Indian Reservation in Washington, and all of the plaintiffs herein were born and reared in Wahkiakum County, Washington, within this District, and now reside therein at the Indian settlement Dahlia in said county, with the exception of Mary Henry Hagen who now resides at Hoquiam in Grays Harbor County, Washington. That the

said Louise E. Henry and all of the plaintiffs herein have at all times since their birth continuously lived as Indians and associated and affiliated with the Quinaielt Indians and associated and affiliated tribes and bands of Indians, and are fish eating Indians of the Pacific Coast.

III.

That the defendant has recognized many members of plaintiffs' family and has enrolled and allotted many members of said family, among whom are: the mother of the plaintiffs, Louise E. Henry, the maternal grandmother Agnes Elliott, the maternal uncles and aunts, J. H. Elliott, George R. Elliott, J. Grant Elliott, Eliza L. Miles and Grace Heinet.

IV.

That the plaintiffs, as above set forth, are full blood brothers and sisters, and that by reason thereof and the facts hereinafter set forth relative to the selection and denial of certain allotments of land upon the Quinaielt Indian Reservation, under respectively the same conditions and like circumstances, these plaintiffs have a common interest in the subject matter of this action and are affected in a similar manner. [264]

V.

That the ground upon which the Court's jurisdiction rests are as follows: That the plaintiffs are Indians and members of the Quinaielt Tribe of Indians, and are entitled under the treaty made and entered into between the United States and the Quinaielt Indians and other bands of Indians, and under

the allotment acts of the United States, to an allotment of at least 80 acres, each, of land upon the said Quinaielt Indian Reservation in the State of Washington within this District. The jurisdiction of the Court further depends upon the Acts of August 15, 1894, 28 Stat. L., 305, as amended by the Act of February 6, 1901, 31 Stat. L., 760, giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

VI.

That about two years ago a Special Alloting Agent was sent by the defendant, more particularly the Secretary of the Interior, to said Quinaielt Indian Reservation for the purpose of alloting lands upon said reservation to Indians entitled thereto, and that said special alloting agent is at this time engaged in alloting lands to those entitled thereto; and said plaintiffs in due course and in accordance with law, regularly proceeded to make selections for allotments of land upon said Quinaielt Reservation, which said selections for allotments are destribed in words and figures as follows, towit:—

Agnes Rubens,—W/2 SE/4 Sec. 14 T 22 N. R 13 W. W. M.

Louise Henry Peterson,—E/2 SE/4 Sec 23 T 22 N R 13 W. W. M.

Mary Henry Hagen, SE/4 NE/4 and NE/4 SE/4 Sec 29 T 22 N R 12 W. W. M.

Chris Henry, Jr.,—S/2 SE/4 Sec 10 T 22 N R 13 W. W. M. [265]

Christine Henry,—E/2 SE/4 Sec 13 T 22 N R 13 W. W. M.

June Henry,—N/2 SW/4 Sec 20 T 22 N R 12 W. W. M.

VII.

That thereafter, plaintiffs are informed and believe, said selections were regularly forwarded to the Secretary of the Interior at Washington, D. C., in accordance with law, and each and every step was regularly completed for the actual approval and granting of said allotments and the issuance of the necessary patents therefor except only the approval of the Secretary of the Interior. That recently the defendant, more particularly the Secretary of the Interior and the Commissioner of Indian Affairs, neglected, refused and declined to allot to said plaintiffs the identical allotments herein described or any allotments of land upon the Quinaielt Reservation whatsoever. That said denial and refusal of plaintiffs' rights to allotments was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason and in no manner justified, and is a denial of a right of said plaintiffs as set forth by the acts of Congress of the United States, its laws and treaties, and a refusal to perform a duty of said defendant as set forth in said laws and treaties.

VIII.

That said allotments selected by the plaintiffs herein are unallotted, unimproved, vacant Indian lands capable of being cleared and cultivated, duly surveyed

by the United States Government and subject to selection and allotment under the laws of the United States.

IX.

That notwithstanding all the facts hereinbefore alleged, defendant, its officers and agents, have wrongfully failed, [266] neglected and refused to allot the said lands to the plaintiffs herein, or to issue to said plaintiffs any trust or fee patent therefor, and have denied and excluded, and still deny and exclude plaintiffs herein from said lands, and have refused and still refuse to let plaintiffs go upon or reside upon said lands or any portion thereof.

X.

That said plaintiffs are entitled to have said lands so selected by them allotted to them, and desire that the same be allotted to them and that their rights be recognized, and that they be permitted to go upon, live upon, cultivate and improve said lands as their homes.

XI.

That plaintiffs waive answer under oath.

WHEREFORE, plaintiffs pray judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of these claimants to said 80 acre tracts of land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that plaintiffs be awarded said lands as their allotments and that they be adjudged and decreed to have full right, power and authority to go

upon, live upon, cultivate and improve said lands as their homes, in all respects as provided by law.

2. That the plaintiffs have all other and further relief as is equitable and just.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Solicitors for plaintiffs. [267]

State of Washington,
County of Pacific,—ss.

LOUISE E. HENRY being first duly sworn on oath deposes and says: That she is the duly appointed and qualified guardian ad litem of the minor plaintiffs above named and makes this verification for and on behalf of said minors as such guardian ad litem; that she has read and knows the contents of the foregoing Bill of Complaint and that the statements therein contained are true as she verily believes.

Her Mark X,
LOUISE E. HENRY.
By Agnes Rubens.

Subscribed and sworn to before me this 19th day of April, 1927.

[Seal] J. W. MATTSON,
Notary Public in and for the State of Washington, residing at Altoona, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, June 14, 1927.

ED. M. LAKIN,
Clerk.
By E. M. L.,
Deputy. [268]

United States District Court, Western District of Washington, Southern Division.

No. 326-E

AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, CHRIS HENRY, Jr., and CHRISTINE HENRY and JUNE HENRY, Minors, by LOUISE E. HENRY, guardian ad litem.

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER.

Comes now the above named defendant by its attorney, and by way of answer to plaintiffs' bill of complaint, admits, denies and alleges as follows:

I.

Referring to paragraph I of plaintiffs' bill of complaint, defendant denies that plaintiffs are members of the Quinaielt Tribe of Indians; defendant admits each and every other material allegation contained therein.

II.

Referring to paragraph II, defendant admits that the mother of said plaintiffs is named Louise E. Henry, and that said mother is an enrolled and allotted Indian of the Quinaielt Indian Reservation; defendant denies each and every other material allegation contained therein.

III.

Referring to paragraph III, defendant admits every material allegation contained therein. [269]

IV.

Referring to paragraph IV, defendant has not sufficient knowledge upon which to base an opinion, and therefore denies the same.

V.

Referring to paragraph V, defendant admits the jurisdiction of this court, and denies each and every other material allegation contained therein.

VI.

Referring to paragraph VI, defendant admits that a Special Allotting Agent was sent to the Quinaielt Reservation, for the purpose of making allotments to Indians entitled thereto; defendant denies each and every other material allegation contained therein.

VII.

Referring to paragraph VII, defendant denies the same.

VIII.

Referring to paragraph VIII, defendant admits that the lands mentioned in paragraph VI of plaintiffs' Bill of Complaint are surveyed, unallotted, unimproved, vacant Indian lands, and subject to selection and allotment under the laws of the United States.

IX.

Referring to paragraph IX, defendant admits that

it has refused to allot said lands to the plaintiffs herein, but denies that said refusal was wrongful.

X.

Referring to paragraph X, defendant denies the same.

WHEREFORE, having answered plaintiffs' bill of complaint, defendant prays that said action be dismissed, and that it have and recover its costs herein.

[270]

THOS. P. REVELLE,
United States Attorney.

DAVID L. SPAULDING,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Southern Division,—ss.

DAVID L. SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Answer; knows the contents thereof and believes the same to be true.

DAVID L. SPAULDING.

Subscribed and sworn to before me this 5th day of Nov. 1927.

[Seal] ALINE ESLER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, Nov. 11, 1927.

ED. M. LAKIN,
Clerk.
By E. R.,
Deputy. [271]

In the United States District Court for the Western District of Washington, Southern Division.

No. 326-E

AGNES RUBENS; LOUISE HENRY PETERSON; MARY HENRY HAGEN; CHRIS HENRY, JR.; and CHRISTINE HENRY and JUNE HENRY, Minors, by LOUISE E. HENRY,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DECREE.

This cause came on to be heard at this term, the plaintiffs Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen and Chris Henry, Jr., appearing personally and the plaintiffs Christine Henry and June Henry, Minors, appearing by their guardian ad litem Louise E. Henry, and all of the plaintiffs appearing by their counsel Stuart H. Elliott, and H. G. & Dix H. Rowland, and the defendant appearing by its counsel Anthony Savage, U. S. District Attorney, Seattle, Wash., David Spaulding, Asst. U. S. District Attorney, Seattle, Wash., John T. McCutcheon, Asst.

U. S. District Attorney, Tacoma, James T. Rahily, Associate Counsel, Washington, D. C.; and the court having taken the matter under advisement and rendered his memorandum decision herein after said cause had been submitted to the court upon written briefs, and thereupon upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED:

That plaintiffs be and they are hereby entitled to the lands heretofore selected by them, situate upon the Quinaielt Indian Reservation, within this District, in Grays [272] Harbor County, in the State of Washington, to-wit:

Agnes Rubens—The West half of the Southeast quarter of Section Fourteen (14), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian.

Louise Henry Peterson—The East half of the Southeast quarter of Section Twenty-three (23), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian.

Mary Henry Hagen—The Southeast quarter of the Northeast quarter and the Northeast Quarter of the Southeast quarter of Section Twenty-nine (29), Township Twenty-two (22) North, Range Twelve (12) West, Williamette Meridian.

Chris Henry, Jr.,—The South half of the Southeast quarter of Section Ten (10), Township

Twenty-two (22) North, Range Thirteen (13) West, Williamette Meridian.

Christine Henry—The east half of the Southeast quarter of Section Thirteen (13), Township Twenty-two (22) North, Range Thirteen (13) West, Willamette Meridian.

June Henry—The North half of the Southwest quarter of Section Twenty (20), Township Twenty-two (22) North, Range Twelve (12) West, Willamette Meridian.

as allotments to be held and owned by said plaintiffs, in all respects as provided by law.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents, be and they are hereby ordered and directed to issue to said plaintiffs Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, certificates of allotment of said lands heretofore described, said certificates of allotment to be in effect and to award to said plaintiffs all of the rights to which said plaintiffs are entitled under and by virtue of the laws of the United States.

It is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, its officers and agents and all persons claiming by, through or under them, be and they are hereby [273] forever barred and estopped from ever claiming or asserting that said plaintiffs, their heirs, executors, administrators and assigns are not entitled to said land as and for their allotment, with full right to use, build upon, clear, improve and occupy the same in all respects as pro-

vided by law; to all of which defendant excepts and its exception is allowed.

Done in open court this 24th day of December, A. D. 1928.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Dec. 24, 1928.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [274]

United States District Court, Western District of Washington, Southern Division.

No. 326-E

AGNES RUBENS, et al,
Plaintiffs,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

ASSIGNMENTS OF ERROR

Comes now the above named defendant, the United States of America, by and through its attorneys, Anthony Savage, United States Attorney for the

Western District of Washington, and John T. McCutcheon and Tom DeWolfe, Assistant United States Attorneys for said District, and James T. Rahily, Associate Counsel, and respectfully submits the following Assignments of Error upon which it relies in support of its appeal from the judgment and decree entered on the 24th day of December, 1928, in said cause, in the District Court of the United States for the Southern Division of the Western District of Washington, and under which Assignments of Error said appellant seeks reversal of the decision, judgment and decree of said Court:

I.

That the District *Coyrt* erred in holding and finding that the lands selected for allotment by the plaintiffs were subject to selection and allotment under the laws of the United States, and that the plaintiffs are lawfully entitled to have such lands allotted to them.

II.

That the District Court erred in holding and finding that the officers and agents of the United States of [277] America have wrongfully failed, neglected and refused to allot the said lands to the said plaintiffs, or to issue to the plaintiffs any trust or fee patent therefor.

III.

That the District Court erred in adjudging that the plaintiffs were entitled to a decree adjudging and decreeing that the said plaintiffs are entitled to the lands selected for their allotments, and that the plain-

tiffs are entitled to have said lands allotted to them by the defendant, its officers and agents.

IV.

That the District Court erred in concluding, holding, and finding that the plaintiffs are entitled to a decree estopping the defendant, its officers and agents, from hereafter interfering with the plaintiffs in their rights to possession of said lands and their rights to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiffs are not entitled to go upon, clear, improve, and build upon said lands.

V.

That the District Court erred in holding and finding that the general allotment statutes and acts do not apply and that the Act of March 4, 1911, is a special allotment act, when said Act of March 4, 1911, expressly provides that allotments are made under the provisions of the allotment laws of the United States.

VI.

That the District Court erred in holding and finding that the Indian tribes who refused to become parties to the Treaty of July 1, 1855, and January 23, 1856, were affiliated therein with the Indian tribes that did participate in said Treaty and actually agreed to the same and [278] signed the same.

VII.

That the District Court erred in holding and finding that the decision and action of the Indian Council of 1922 as to recognition and adoption of members

was in itself authoritative, notwithstanding the fact that said proceedings of said council were in no part approved by the Secretary of the Interior of the United States of America.

VIII.

That the District Court erred in holding and finding that under the Act of June 7, 1897, where an Indian woman who was recognized tribally at that time and married to a white husband has children, that the offspring of said children are entitled to receive allotments under the law.

IX.

That the District Court erred in holding and finding that the rights of children of a white man and an Indian woman in tribal property embraces the children of the mother who was living at the time of the passage of the Act of June 7, 1897, and was not then recognized by the tribe as one of its members.

X.

That the District Court erred in holding and finding that the plaintiffs and their parents had been properly adopted into the Quinaielt tribe by the adoption action of the Indian Council of said tribe of 1912 when said action was void for not having been approved by the Secretary of the Interior of the United States.

XI.

That the District Court erred in holding and finding that the plaintiffs who were born of a marriage prior [279] to 1897 between a white man and a

woman of Indian blood who was living on June 7, 1897, and not then recognized as a member of the tribal Indians of the Quinaielt Reservation, were entitled to allotments thereon.

XII.

That the District Court erred in entering decree herein on February 5, 1929, awarding allotments to the plaintiffs herein when the evidence adduced at the time of the trial herein was insufficient to sustain said decree and exceptions to said decree having been timely noted.

XIII.

That the District Court erred in holding and decreeing that the defendant, its officers and agents, are directed to issue to the plaintiffs, certificates of allotment of the lands claimed to be selected by said plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

TOM DeWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within assignments this 19th day of March 1929.

STUART H. ELLIOTT,
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar. 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [280]

United States District Court, Western District of Washington, Southern Division.

No. 326-E

AGNES RUBENS, et al,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendants.

ORDER ALLOWING APPEAL.

On the application of the defendant herein, it is hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Decree heretofore entered and filed herein on the 24th day of December, 1928, be, and the same is hereby allowed.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE IN OPEN COURT this 20th day of March, 1929.

J. STANLEY WEBSTER,
Judge.

[Endorsed]: Received a copy of the within Order this 20th day of March 1929.

STUART H. ELLIOTT,
and
H. G. & DIX H. ROWLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Mar. 20, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [281]

United States District Court, Western District of Washington, Southern Division.

No. 229-E.

HILARY HALBERT, JR., et al,
Plaintiffs,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

No. 300-E.

RICHARD HALBERT, etc.,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

No. 301-E.

VERNON SIDNEY HALBERT, etc.,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 302-E.

SIDNEY E. HALBERT, etc.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 306-E.

ARCHIE PELLARD,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 307-E.

ROSE PEERS PICKERNOLL, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 309-E.

MARY FRANCIS PROVOE, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 312-E.

LULU M. ELLIOTT, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant. [282]

No. 313-E.

BERTHA EVELYN PAYNE, etc.,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 314-E.

LIZZIE ROLFSON, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 315-E.

VIRGINIA WALKOWSKY, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 320-E.

MARY BARICHIO PETIT, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 321-E.

DEWEY BARICHIO, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 324-E.

EDNA MAY ELLIOTT, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 325-E.

CHAS. G. ELLIOTT, JR., et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

No. 326-E.

AGNES RUBENS, et al,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM DECISION ON THE MERITS, AFTER TRIAL TO THE COURT.

Filed: Nov. 21, 1928. [283].

STUART H. ELLIOTT, Tacoma, Washington,

H. G. & DIX H. ROWLAND, Tacoma, Washington,
Solicitors for Plaintiffs,

THOS. P. REVELLE, former U. S. District Attorney, Seattle, BERTIL E. JOHNSON, former Asst. U. S. Dist. Attorney, Tacoma, ANTHONY SAVAGE, U. S. District Attorney, Seattle, Wash., DAVID SPAULDING, Asst. U. S. Dist. Attorney, Seattle, JOHN T. McCUTCHEON, Asst. U. S. Dist. Attorney, Tacoma, JAMES T. RAHILY, Associate Counsel, Washington, D. C.
Attorneys for Defendant.

CUSHMAN, District Judge.

Plaintiffs cite: Act of Congress, June 7, 1897 (30 St. L. 90); Oakes v. U. S., 172 Fed. 305; Wilson v. U. S. (This Court No. 218-E); Baker v. U. S. (This Court No. 250-E); Handbook of American Indians, Bureau of American Ethnology, Bulletin 30, Part I, page 569, "Hoquiam"; Life of Isaac I. Stevens, by Hazard Stevens, Vol. I, p. 451; Treaty of Medicine Creek (Kappler's Indian Affairs, Laws and Treaties, Vol. II, p. 661); Treaty with the Dwamish, Suquamish, etc., 1855 (Kappler's etc., Vol. II, page 669); Treaty with the S'Klallam, 1855 (Kappler's etc., Vol. II, page 674); Swan's Three Years at Shoalwater Bay, p. 337, 344, 346 to 350; General Allotment Act of February 8, 1887 (24 St. L. 380); Special Allotment Act, March 4, 1911 (36 St. L. 1345); Handbook of American Indians, Part II, page 388; Tommy Payne v. U. S. 264 U. S. 446; Executive Order of 1873; Opinion of the Solicitor of the Department of the Interior, dated September 2, 1916; Handbook of American Indians, Part II, p. 388; Bonifer v. Smith, 154 Fed. 889 and 166 Fed. 846; Leecy v. U. S. (C. C. A. 8th Circuit) 190 Fed. 289; appeal dismissed, 232 U. S. 731 (58 L. Ed. 818); Act of February 6, 1901 (31 St. L. 760); Sloan v. U. S. 118 Fed. 283, appeal dismissed, 193 U. S. 614 (48 L. Ed. 814); Morrison v. Work, 286 U. S. 481 (69 L. Ed. 394); [284] Hyyu-tse-mil-kier v. Smith, 119 Fed. 114 and 194 U. S. 401 (48 L. Ed. 1039); Waldron v. U. S. 143 Fed. 413; Sully v. U. S. 195 Fed. 133; Agnes Elliott, et al, v. U. S. (this court No. 272-E) decided May 21, 1926; Act of June 30, 1919 (41 St. L. 9); Pape v. U. S. 19 F (2d) 219; U. S. v. Higgins, 103 Fed. 348; Davidson v. Gibson, 56 Fed. 143; U. S. v. Work, 6 F

(2d) 694; Vezina v. U. S. 245 Fed. 411; Crichton v. Shelton, 33 Land Decisions 205; Addie Prickett, et al, 50 Land Decisions 554; Bisek v. Bellanger, 5 F (2d) 994; Garfield, Secty. v. U. S. Goldsby, 211 U. S. 249 (53 L. Ed. 168); Stark v. Mather, 12 A. D. 565; State v. Bachelder, 5 Minn. 223; Baggo v. Merced Mining Co., 14 Cal. 365; Sherman v. Buick, 93 U. S. 209; Smith v. Winton, 3 A. D. 755; Sharp v. Dittenthaler, U. S. C. C. 4 P. C. L. J. 31; Folk v. U. S., 233 Fed. 177; U. S. v. Bessie Wildcat, 244 U. S. 145 (61 L. Ed. 1033); State v. McDonald, 100 Wis. 8 (84 N. W. 171, 81 Am. St. Rep. 878); Ruling Case Law, Vol. 15, pp. 1007, 1008, Sec. 181 and 182; 9 Fed. Cases No. 5206-9030; Herman on Estoppel, p. 160, sec. 152, and Vol. I, p. 344; Act of June 14, 1862 (12 St. L. 427); R. S. Sec. 2119; William Banks case, 26 Land Decisions 71; Payne v. U. S. 264 U. S. 446; U. S. ex rel Besaw v. Work, 6 Fed. (2d) 695; Act of August 24, 1912 (37 St. 518-535, Sec. 19); Smith v. Bonifer, 166 Fed. 846; U. S. etc. v. McGowan, (This court No. 331-E); Montoya v. U. S. 180 U. S. 261 (45 L. Ed. 521); Equity Rule 30; Tim L. Driscoll v. U. S., 271-E (this court); Case F-275, U. S. C. C.; Intercourse Act of 1834; U. S. vs. 43 Cases of Brandy, 14 Fed. 539; 11 Fed. 47; Sec. 2140 Revised Statutes; Fowler v. U. S., 1 Wash. Terr. 3; Townsend v. U. S., 265 Fed. 519; U. S. v. Myers, 206 Fed. 387; Bates v. Clark, 95 U. S. 204; U. S. v. Martin, 14 Fed. 817; Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401; Lemieux v. U. S., 15 Fed. (2d) 518; Act of August 15th, 1894, [285] (28 St. L. 305); Act of February 6, 1901, (31 St. L. 760); Allotment Act of 1885, Chap. 319, (23 St. L. 340); Cherokee Trust Funds, 117

U. S. 288; U. S. v. Clapox, 35 Fed. 575; Treaty of March 19, 1867 (16 St. L. 719); Allotment Act of January 14, 1889 (25 St. L. 642); Kendall v. Ewert, 259 U. S. 139; Sunderland v. U. S., 266 U. S. 226; La Roque v. U. S., 239 U. S. 66; Delaware Indians v. Cherokee Nations, 193 U. S. 127; Choctaw Nation v. U. S., 179 U. S. 494; Eastern Cherokees v. U. S., 45 Ct. Cl. 229; State v. Smokalem, 37 Wn. 91; Peter Hand Co. v. U. S., 2 Fed. (2d) 449; Swan v. Public Utilities, 298 Fed. 116; In re Southern Fruit & Produce, 14 Fed. (2d) 676; U. S. v. Work, 6 Fed. (2d) 694.

Defendant cites: Act of June 7, 1897 (30 St. 90); Oakes et al v. U. S., 172 Fed. 305; Act of February 8, 1887 (24 St. L. 390); William Banks case, 26 Land Decisions, Dept. of Interior, 71; Reynolds v. U. S., 205 U. S. 685; Act of March 3, 1875 (18 St. 420); Act of February 8, 1887 (24 St. 388); Act of August 8, 1888 (25 Stat. 392); Act of June 7, 1897 (30 Stat. 90); Pape v. U. S., 19 Fed. (2d) 219; Smith v. Bonifer, 154 Fed. 883; Medicine Creek Treaty, Dec. 26, 1854 (10 Stat. 1132); Executive Order Oct. 1, 1886 (Kappler, Indian Laws & Treaties, Vol. I (2d Ed) pp. 901 to 904; Executive Order of November 4, 1873; Act of March 4, 1911; Act of August 24, 1912 (37 Stat., 518-535); Opinion of Secretary of the Interior, September 29, 1926; L. C. 17201-26; Agnes Elliott, et al v. U. S., (This court No. 272-E, June 12, 1926); Montoya v. U. S., 180 U. S. 261 (45 L. Ed. 521); Executive Order of September 22, 1866 (Kappler, Laws & Treaties, Vol. I, 2d Ed. p. 924); U. S. v. 43 Cases Brandy, 14 Fed. 539; Treaty with the Omaha (10 Stat. 1043), Kappler, Vol. 2, 2d Ed.,

pp. 612, 613; Fowler v. U. S., 1 Wash. Terr. 3; Ruling Case Law, 14 p. 137; 4 U. S. St. at L. 729; Townsend v. U. S. [286] 265 Fed. 519; U. S. v. Myers, 206 Fed. 387 (124 CCA 269); Indian Intercourse Act, 1834, section 23 (4 Stat. 732); In re Carr, 5 Fed. Cases 115, 116; Bates v. Clark, 95 U. S. 204; U. S. ex rel Besaw v. Work, etc., 6 Fed. (2d) 694; Lemieux v. U. S. (U. S. C. C. A.) 15 Fed. (2d) 518; Cherokee Trust Funds, 117 U. S. 288; U. S. v. Clapox, 35 Fed. 575; Treaty of March 19, 1867 (16 Stat. 719); Act of January 14, 1889 (25 Stat. 642); Super v. Work, 3 Fed. (2d) 91; Lone Wolf v. Hitchcock, 187 U. S. 553; Kendall v. Ewert, 259 U. S. 139; U. S. Rev. Stat. Secs. 441, 463; Sunderland v. U. S., 266 U. S. 226; U. S. v. Hitchcock, 205 U. S. 80; U. S. ex rel. Detling v. Work, 18 Fed. (2d) 822; Act of March 3, 1871 (Rev. St. Sec. 2079); La Roque v. U. S., 239 U. S. 66; Bizek v. Bellanger, 5 Fed. (2d) 994; Kappler, Laws & Treaties, Vol. 3, pp. 572, 3, (38 Stat. 77, 88); Delaware Indians v. Cherokee Nations 193 U. S. 127; Choctaw Nation v. U. S., 179 U. S. 494; Eastern Cherokees v. U. S., 45 Ct. Cl. 229; State v. Emokalem, 37 Wash. 91; State v. Howard, 33 Wash. 250; State v. Williams, 13 Wash. 335.

Plaintiffs in these suits ask to have allotted them lands on the Quinaielt Indian Reservation. In each of these cases it is alleged plaintiffs are members of the Quinaielt Tribe of Indians. In cases 299-E, 300-E, 301-E and 302-E the Complaints allege that plaintiffs are Indians, which the defendant admits. In the remaining cases it is alleged by the plaintiffs that they are of part Indian blood. In each case the defendant

denies that plaintiffs are members of the Quinaielt Tribe of Indians.

It will be necessary to consider matters in these cases not discussed in former cases relating to allotments on the Quinaielt Indian Reservation. (Tommy Payne v. U. S., 264 U. S. 446 and 284 Fed. 826; John Mitchell et al, v. U. S. No. 242-E [287] this court; Ernest C. Wilson, et al v. U. S. No. 218-E this court; Ellen Baker, et al v. U. S. No. 250-E this court; Agnes Elliott, et al v. U. S. No. 272-E this court; Tim L. Driscoll, et al v. U. S. No. 271-E this court.)

Governor Stevens, Superintendent of Indian Affairs for Washington Territory, negotiated treaties with the Indian tribes of Upper Puget Sound by the Treaty of December 26, 1854, known as the Medicine Creek Treaty (10 Stat. 1132), Kappler, Vol. II, p. 665; with the tribes of Lower Puget Sound and those to the east of Admiralty Inlet, January 22, 1855, known as the Point Elliott Treaty (12 Stat. 927), Kappler, Vol. II, p. 669; with the tribes on the Straits of Juan De Fuca and Hood's Canal, at Point no Point, January 26, 1855 (12 Stat. 933), Kappler, Vol. II, p. 674; with the Makah tribe about Cape Flattery at Neah Bay, January 31, 1855 (12 Stat. 939), Kappler, Vol. II, p. 682.

In February, 1855, Governor Stevens undertook to make a treaty with the tribes of Southwest Washington. While a treaty was eventually made with the Quinaielt and Quillehute Indians, no separate treaty was made with the Quits and Hoh Indians between the Makah on the North and the Quillehutes on the South and none with the Chehalis, Cowlitz and

Chinooks. The final paragraph of the Quinaielt treaty is:

> "In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Quinai-elt River, July 1, 1855."

The history of the main controversy arising in these cases, that is, whether members of the Chehalis, Cowlitz and Chinook bands and Shoalwater Bay settlements if the latter are to be considered as in any way distinguished from the Chinook and Chehalis, are entitled to allotments on the Qui- [288] naielt Indian reservation—may not be better shown than by the opinion of the Solicitor of the Department of the Interior on September 2, 1916, which is as follows:

* * * * * * * * * * *

> The Secretary of the Interior.
>
> Sir:
>
> My opinion is requested, upon recommendation of the Indian Office, concerning a large number of applications for enrollment and allotment with the Indians of Quinaielt Indian Reservation, Washington, transmitted by Thomas G. Bishop, President of the Northwestern Federation of American Indians.
>
> The applicants claim to belong to various tribes in northwestern Washington, more than 40 in

number, including the Chinooks, Clallams, Clatsops, Cowlitz, Dwamish, Quinaielt, Lummi, Muckleshoots, Nisquallys, Puyallups, Shoalwaters, Squaxon Island, Skokomish, and Swinomish. The question as to whether they are entitled to the rights sought is dependent upon the construction to be placed upon the treaty of July 1, 1855 and January 25, 1856 (12 Stat., 971), with the Quinaielt and Quillehute Indians, the Executive Order of November 4, 1873, setting apart the Quinaielt Indian Reservation, and the Act of March 4, 1911 (36 Stat., 1345), authorizing allotments on the Quinaielt Indian Reservation to Indians other than those parties to the treaty of 1855 and 1856.

By the above treaty the Indians ceded to the United States a vast tract of country, including nearly 100 miles of the Pacific Coast, extending approximately from a few miles south of Cape Flattery to a few miles north of Gray's Harbor, and back from the coast some 30 or 40 miles to the middle of the coast range of mountains. Article 2 reserved an area sufficient for their wants to be selected by the President and "surveyed or located and set apart for their exclusive use," to which they agreed to remove. Article 3 secured to them the right of taking fish at all usual and accustomed grounds and stations in common with the citizens of the Territory. Article 4 provided that the money paid for their lands should be applied "to the use and benefit of the said Indians under the direction of the President." Article 5 made an appropriation to enable

the Indians to remove to and settle upon the reservation to be selected for them and for other purposes. Article 6 provided that the President could at his discretion consolidate these Indians with other tribes and cause the whole or any part of the lands to be reserved under the treaty with such other lands as might be selected in lieu thereof to be surveyed into lots "and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable." [289]

In accordance with the provisions of the treaty a reservation was selected by the then Superintendent of Indian Affairs for Washington Territory and surveyed under contract, but as the same was too small to provide for the needs of the Indians, it was never formally set apart by Executive Order. The reservation selected was located on the Pacific Coast from about one-half mile north of the Quinaielt River to a point ten miles south of that river and about six miles back from the coast. In 1872 (?) (Question the Court's), the Superintendent of Indian Affairs for Washington Territory reported and recommended as follows:

All the tribes made parties to this treaty, together with the remnants of the Chehalis, Humptulups, Shoalwater Bay, and Chinook

tribes, residing along this coast south of the reservation to the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish-eaters, and draw their subsistence almost wholly from the water, and therefore have but little taste or desire for agricultural or land productions.

* * * * * * * * * *

As the land north and west of this reservation, for many miles, has no attractions for white settlers, and as the Quilliutes, Hohs, and Quits do not reside on the reservation, and refuse to come on to it as at present constituted, and as there is but a small amount of agricultural and pasture lands, on the reservation, I recommend that it be enlarged as follows: Commencing at the northwest corner of the reservation at tidewater, on the ocean-beach, thence north with the tidewater of said beach to half a mile north of the mouth of the Queetshee River, thence easterly with the course of said river three miles, thence southeasterly to the northwest point of Quinaielt Lake, thence easterly and southerly around the east shore of said lake to the most southerly end of the same, thence southwesterly in a direct line to the northeast corner of the present reservation. The reservation thus enlarged would afford two more fisheries on the Pacific coast, and perhaps several others around Lake Quinaielt,

and would afford occasional patches of agricultural and grazing lands, and upon it should be collected not only the three tribes named, but also all the other tribes and bands of fish-eating Indians on the Pacific coast, from the south side of Neah Bay reservation to the mouth of the Columbia River; all of whom could find room and homes on this enlarged reservation.

In view of this report, the Indian Office, on October 31, 1873, recommended the enlargement of the reservation selected by the Superintendent so that the "Hohs, Quits, and other fish-eating Indians residing upon the coast between the Quinaielt river and Makah Indian Reservation may be induced to go upon the reservation," and by Executive Order of November 4, 1873, under authority conferred on the President by Article 6 of the treaty of [290] 1855 and 1856, an enlarged reservation was set apart as follows:

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt,

Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, viz: Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, and with the line of said survey, 5 miles to the southeast corner of said reserve thus established; thence in a direct line to the ma[illegible] southerly end of Quinaielt Lake; thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said river to a point on the Pacific coast, at low water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

The Act of March 4, 1911, *supra*, provides:

That the Secretary of the Interior be, and is hereby, authorized and directed to make allotments on the Quinaielt Reserevation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, (25th) (Court's correction) eighteen

hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes;

Provided, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

No mention is made in the treaty of 1855 and 1856 of any tribe or bands of Indians as being allied or affiliated with the Quinaielts and Quileutes, but no doubt exists as to the right of the Indians of the particular tribes mentioned in the treaty, executive order, and allotment act to allotment on the Quinaielt Reservation. The question remains, however, as to just what bands or tribes may be entitled to enrollment and allotment with the Indians of that reservation under [291] the phrase, "other Indians in that locality"; "other tribes of fish-eating Indians of the Pacific Coast"; "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's correction) 1856."

The question has heretofore received consideration. In 1905, the Indian Office instructed the Special Alloting Agent in Washington with respect to allotments on the Quinaielt Reservation as follows:

An examination of the respective treaties and executive orders shows that a number of

> reservations have been created for Indians along the Pacific Coast and adjacent waters in the State of Washington, and presumably many, if not all of the Indians for whom such reservations have been created, are fish-eaters and would come within the terms of your instructions as to who are entitled to allotments on the Quinaielt Reservation if there were no other considerations, but it would seem to be the clear intent of the order and the several treaties to provide a reservation for the Quinaielt, Quileute, Hoh and Quit Indians and other fish-eaters who have no rights upon another reservation. Therefore, it would seem the proper course for you to pursue would be to recognize the rights of any member of a fish-eating tribe or band, who does not have rights upon some other reservation.

In 1906 the same allotting agent, in response to a question as to whether the Chinook Tribe of Indians should be classed as "fish-eating Indians of the Pacific Coast" was thus advised by the Indian Office:

> It is not believed that they should be classed as "fish-eaters" in the sense that will entitle them to allotment on the Quinaielt Indian Reservation. It is asserted that at one time they were all on the Siletz and Grande Ronde Indian Reservations.
>
> * * * * * * * * *
>
> For your purpose no Chinook should be

considered as a "fish-eater" unless he has affiliated with and been acknowledged to be a member of the band of Indians residing on the Quinaielt Indian Reservation.

During the same year the same allotting agent, in response to a request for the names of the tribes classified as fish-eating Indians of the Pacific Coast for guidance in making allotments on the Quinaielt reservation, was advised:

> That all the tribes and bands along the coast of the Pacific Ocean and the Sound are termed fish-eating Indians, but for your purpose only those Indians who have affiliations with and are recognized as members of the bands occupying the Quinaielt Reservation should be considered in making allotments and in addition such of them as may have left those bands and have not received allotments. [292]

The agent was also advised:

> No Hoh or Quileute Indian residing upon an Indian Reservation set apart for such Indian's use is entitled to an allotment on the Quinaielt Indian Reservation. * * * * But if members of the Quileute and Hoh tribes are affiliated with the Quinaielt Indians, and are not residents upon reservations set aside for their particular use, they are entitled to allotments with the Quinaielts.

This evidently had reference to the fact that regardless of the Executive Order of November 4,

1873, which specifically included the Quileutes and Hohs, separate reservations were set apart for the use and occupation of said Indians by Executive Orders of February 9, 1889, and September 11, 1893. In fact, specific reservations in addition to the Quileute and Hoh reservations were from time to time set apart by Executive Orders for the different tribes or bands of Indians in Washington Territory and State, including Chehalis, Lummi ("Dwamish and other allied tribes") Makah ("and other Indians"), Muckleshoots ("for the exclusive use of Indians in that locality"), Nisquallys ("for the Nisqually, Puyallup, and other bands"), Ozettes ("for the Ozette Indians not now residing upon any Indian reservation"), Shoalwater, Skokomish ("for the use of the S'Klallam Indians"), Swinomish, and Tulalip or Snohomish.

The Indian Office, on May 30, 1911, in response to an inquiry of the Superintendent of the Cushman School as to the scope of the Act of March 4, 1911, *supra,* said:

> The Office understands this legislation to permit of allotments within the Quinaielt Reservation, Washington, to all "fish eating Indians" of the Pacific Coast, who were affiliated with the Quinaielt Indians in the treaty of July 1, 1855, and January 23, (25) (Court's Correction) 1856 (12 Stats. L., 971). It appears from the records here that the Clallam Indians, the Squaxon Island, and others, as well as the Hohs, Ozettes and Quileutes were affiliated with the Quinaielts

in the treaty referred to, and hence unallotted members of these tribes are entitled to allotments within the Quinaielt Reservation.

And July 26, 1911, the Indian Office in a letter to George L. Houghton, an attorney at Thomas, Washington, said:

> The Act of March 4, 1911 (Public 486), authorizes allotments on the Quinaielt Reservation, Washington, to all members of the Hoh, Quileute, Ozette and other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's correction) 1856, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes.
>
> The Act referred to was not enacted, however, with the view of giving each Indian in Washington who has not received land an allotment on the Qui- [293] naielt Reservation, but was recommended by the Department to provide allotments thereon for those Indians who were *affiliated* with the Quinaielt and Quileute Indians in the treaties named herein and who would have for that reason some equitable rights on the reservation. It is not believed that an Indian who has already received an allotment on Squaxon Island, should be permitted to change his lands for a more valuable allotment on the Quinaielt Reservation. There is also a serious question whether the Squaxon Island In-

dians are entitled to the benefit of the Act of March 4, 1911, for the reason that it does not appear that these Indians were affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's correction) 1856.

August 23, 1911, the Indian Office issued instructions to the Superintendent of Cushman School, approved by the Department October 14, 1911, regarding enrollment and allotment on the Quinaielt Reservation. Among other things it was said:

> You should investigate and ascertain the names, etc., of all enrolled, non-allotted Indians of the bands and tribes within the purview of the act, supra, and submit a list or schedule thereof to the office with a full report and such recommendation as you may desire to make.
>
> Should there be Indians of any of the tribes or bands who were affiliated with the Quinaielt and Quileute tribes in the said treaty of 1855-1856, who are not *now enrolled* as belonging to any reservation, and desire to be enrolled and allotted with the Indians of the Quinaielt Reserve, you should aid them in submitting formal applications giving the facts in full as to their Indian blood, family history, residence up to the present time, and affiliation of the band or tribe to which they belonged with the Quinaielt and Quileute tribes at the time of the said treaty. Also you should

properly investigate their cases and obtain statements to be sworn to before you or a Notary Public from such of the relatives of the applicants as may have knowledge of the facts in their cases. The application should, following the usual method of procedure, then be submitted with all the evidence to the Tribal Council of the Indians of the Quinaielt Reservation in order that the members of the said Council may say what they know as to the facts in the case of the applicants and may express their views with reference to having them enrolled and allotted at the Quinaielt Reserve.

* * * * * * * * * *

Your report also should include a statement duly certified by you from the Chiefs and head men of the Quinaielt and Quileute tribes as to what bands and "other tribes of Indians in Washington were affiliated with them in the treaty of July 1, 1855, and January 23, (25) (Court's correction) 1856," and the location at that time of such bands and tribes. [294]

The Indian Office, after referring to the Executive Order of November 4, 1873, concurred in the opinion of the Superintendent that the Quinaielt reservation was set apart not only for the Quinaielt, Quileute and other Indians in that locality, but also for "all the other tribes and bands of fish-eating Indians on the Pacific coast from the south side of the Neah Bay reservation

to the mouth of the Columbia river," and that those for whom it was set aside and who have not already been provided by the Government with allotments and homes, should, if now entitled thereto, be allotted on the Quinaielt Reservation. The Superintendent was further advised:

> Any poor and homeless Indians, who do not fall within the provisions of either the said Act of Congress or Executive Order, who desire to cast their lot with the Indians of the reservation and establish homes thereon and become adopted into one of the tribes, should upon their request, be aided by you in making applications for enrollment *by adoption*, and their formal applications with supporting evidence should be submitted by you to the tribal council for its consideration and action. Of course, all such applicants should set out in their statements to be sworn to before you or a notary public, that they have not heretofore been provided for by the Government, have not received Fourth Section allotments and have no land on the public domain; that they desire to establish homes upon the Quinaielt Reservation and remain there; and in addition they should give the facts as to their parentage, Indian blood and where they have resided up to the present time.

In letter of the Department dated December 2, 1922, to George L. Houghton, it was said:

The Department is of the opinion that an Executive Order authorizing allotments on the Quinaielt Reservation to all Indians in Washington who have not received allotments and who were not affiliated with the Indians for whom that reservation was provided would not be applicable. It is believed that the claims of the fish-eating Indians generally in the State of Washington are fully protected so far as allotment rights on the Quinaielt Reservation are concerned, in cases where they can substantiate their claims, and that these claims will be presented in the course of time to the Indian Office for appropriate action thereon.

January 4, 1912, the Indian Office instructed the Superintendent of Cushman School as follows:

The Act of March 4, 1911 (36 Stats. L., 1345), authorizes allotments on the Quinaielt Reservation only to those members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington, who were affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 26, (25) (Court's correction) 1856. The question of "affiliation" therefore, will be the one solely to be con- [295] sidered in determining the rights of enrolled members of other tribes who may apply for allotments on the Quinaielt Reservation.

* * * * * *

It may be said here, however, that the

records of the Office and the treaty with the Quinaielt and Quileute fail to show that any other tribes, bands or villages of Indians in Washington were affiliated with the Quinaielt and the Quileute in the treaty with these bands of 1855-1856. The statement from the chiefs and head men of the Quinaielt and Quileute, however, as to what tribes, bands or villages were affiliated with them in the treaty would have weight with the Office in determining the rights of such other tribes, bands or villages.

In letter of February 12, 1912, requesting instructions in the matter of making allotments on the Quinaielt Reservation, the Superintendent of Cushman School stated that he had sought such allotments for the fish-eating tribes on the Pacific Coast on the wording of Executive Order of November 4, 1873, which sets aside the Quinaielt reservation not only for the Quinaielt and Quileute tribes, but also for other tribes in that locality; that it was generally understood, when the Quinaielt reservation was set aside it was to provide for any and all Indians in Washington west of the Cascades, who had not been provided for in any other treaty.

Replying, under date of March 26, 1912, the Indian Office stated among other things:

> The right of the various bands of fish-eating Indians in Washington to take land on the Quinaielt reservation, except as set out in Office letter of Instructions to you

dated August 28, 1911, has been considered mainly from the standpoint of the authority contained in the Act of March 4, 1911, supra.

It is admitted that with the view to complying with the terms of the Treaty of 1855 and 1856 with the Quinaielt and Quileute Indians, a reservation was surveyed for these bands by A. C. Smith in 1863.

* * * * * * *

This tract was never specifically set aside by Executive Order, Executive Order of 1873, however, creating the Quinaielt reservation included the lands originally surveyed by A. C. Smith, the enlarged reservation being apparently to provide allotments for the Hohs, Quits, and other fish-eating Indians residing on the coast between the Quinaielt River and the Makoh (Makah) (Court's correction) Reservation. The Office does not believe, however, that the children of the various bands for whom reservations were established and allotted, born since allotments were made on the reservation, as, for instance, Tulalip, Puyallup, Nisqually, Lummi, Chehalis, etc., can be considered as being entitled to allotments on the Quinaielt reservation under authority of Executive Order [296] dated November 4, 1873; or that straggling bands or individual Indians, and their children, who have never lived on any reservation, are entitled to allotments on the Quinaielt reservation

merely upon application therefor; without the intention of going to the reservation and making permanent homes thereon.

* * * * * *

As it seems to be the general belief, from various correspondence received at this Office that all unallotted fish-eating Indians west of the Cascade Mountains, for whom no reservation was provided, are entitled, under the wording of Executive Order dated November 4, 1873, and the provisions of the Act of March 4, 1911, to allotments on the Quinaielt reservation, the Office deems it advisable to mention briefly the treaties with these Indians.

After referring to the provisions of the treaty of July 1, 1855, and January 25, 1856, with the Quinaielt and Quileute Indians, the treaty of Medicine Creek of December 26, 1854 (10 Stat., 1132), with the Puyallup, Nisqually, Squawkain, (Squawskin) (Court's correction) and other bands around the head of Puget Sound, the Treaty of Point no Point of January 26, 1855 (12 Stat., *93* 933), with the S'Kallams, Skokomish, and other tribes, the treaty of Point Elliott (12 Stat., 927), with the Lummi, Skokomish, and other tribes, the Indian Office said:

These treaties were made with four groups of tribes or bands, no one group apparently being affiliated with the other.

There would be no justice in permitting the children of the Indians whose reserva-

tion has already been allotted to take allotments on the Quinaielt reservation, unless it was with the consent of the Indians now having rights thereon. The various unattached or individual Indians not parties to any treaty may, however, as outlined in Office letter of instructions approved by the Department, submit their individual applications through you to the Quianielt tribe for enrollment therewith; and those enrolled members of the fish-eating tribes who were living when their reservations were allotted, but who did not receive lands, although entitled, are perhaps now entitled to allotments on the Quinaielt reservation without the formality of being enrolled at that reservation.

The Hoh Indians appear to have been affiliated with the Quinaielts and Quileutes (Bulletin 30, Handbook of American Indians, Bureau of Ethnology), although they were not actual parties to the treaty of July 1, 1855, and January 23, (25) (Court's correction) 1856. Unallotted members of this band may, therefore, be permitted to take allotments on the Quinaielt reservation under the provisions of the Act of March 4, 1911, supra.

The Ozettes, one of the several villages of the Makah, were parties to the treaty of Makah, dated January 31, 1855 (12 Stats. L., 939), and they would not be entitled to take allotments on the Quinaielt reserva-

tion under authority of the [297] Act of March 4, 1911. (?) (Question, the Court's) It may be, however, that they are entitled by reason of the wording of the Executive Order creating the Quinaielt reservation. At any rate, they may individually submit their applications through you to the council for enrollment with the Quinaielts.

In letter of April 5, 1912, to Representative William R. Humphrey, in regard to the rights of the Clallam Indians to take allotments on the Quinaielt reservation, the Indian Office said:

> The legislation contained in the Act of March 4, 1911 (36 Stats. L., 1345), was recommended by this Office with the view to allotting on the Quinaielt Reservation all Indians of the fish-eating tribes on the Pacific Coast, who were affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 25, 1856, and who failed to receive allotments when their tribes were given lands. The Clallams, or S'Klallams, however, were clearly not affiliated with the Quinaielts and Quileutes, but instead they were parties to the treaty of Point no Point, dated January 26, 1855 (12 Stats. L., 933). It appears, however, that very few, if any, of the S'Klallam Indians took land on the reservation set aside for them by Executive Order, dated February 25, 1874, based on the foregoing treaty, and that the lands reserved by the

said order were allotted almost entirely to the Skokomish, allotments to these Indians being completed in 1906.

As the S'Klallam Indians did not receive any benefit from the reservation established for them, based upon treaty, the Office believes that those members who are entitled should be aided so far as possible in obtaining lands on the Quinaielt Reservation.

In 1912, a bill was introduced in Congress amending the Act of March 4, 1911, and providing for allotments on the Quinaielt reservation "to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute, and other fish-eating Indians of the State of Washington." This bill was not reported upon by the Department and did not become a law.

The question of the right of the Clallam Indians and other so-called "fish-eating Indians of the Pacific Coast" to allotments on *he* Quinaielt reservation without additional legislation was considered by the Indian office in letter to the Department of January 4, 1913. It was stated among other things in said letter as follows:

This office has been confronted with the necessity of determining from time to time the right of many so-called "fish-eating Indians" of the Pacific Coast to enrollment and allotment on the Quinaielt Reservation, Washington, particularly unallotted members of the Clallam, Cowlitz, Squaxon Is-

land and other "fish-eating" Indians, under the treaties, executive orders and acts of Congress hereinafter referred to. [298]

* * * * * * *

The expression "other tribes of fish-eating Indians on the Pacific Coast" renders it somewhat difficult to determine just who may be admitted to allotment rights on this reservation, but it would seem that after a careful examination of the various treaties and executive orders relating to the Indians in the State of Washington, it may safely be assumed that the intention of the Executive Order of November 4, 1873, was to provide a reservation on which all fish-eating Indians of the Pacific Coast not provided for elsewhere, could be given homes or allotments.

* * * * * * *

A letter from this Office, dated October 21, 1873, submitting to the Department the draft of the Executive Order subsequently signed by the President November 4, 1873, invited attention to a report from Superintendent Miller, dated September 16, 1861, (?) (Question, the Court's) in which he said that the Quileutes, Hohs and Quits did not reside on the reservation and had refused to remove thereto; that the enlarged reservation as recommended would afford two small fisheries on the Pacific Coast and several others around Lake Quinaielt and

upon it should be collected "not only the three tribes named, but also all the other tribes of fish-eating Indians on the Pacific Coast from the south side of the Neah Bay Reservation to the mouth of the Columbia River."

It would appear, therefore, that the intention, in making the enlargement of the Quinaielt Reservation, was to provide a body of land on which could be located the fish-eating Indians of the Pacific Coast not otherwise specifically provided for.

Prior to the passage of the Act of March 4, 1911 (36 Stats. L., 1345), this Office held that members of the Hoh, Ozette and Quileute Indians who were not residing on the Quinaielt Reservation and who were not affiliated with and recognized by that tribe as members, were not entitled to allotments on that reservation regardless of the provisions of the treaty of 1855-1856, supra, and the provisions of Executive Order of November 4, 1873. This holding now appears to have been founded on the assumption that the Hoh, Ozette and Quileute Indians had separate reservations provided for their tribe by distinct executive orders, separate and apart from that of November 4, 1873, and having separate reservations provided for their benefit, allotments to these Indians should be confined to such reservations, regardless of the provisions of the Executive Order of November 4, 1873.

Attention is invited here to the fact, however, that the reservation provided for the Quileute Indians by the Executive Order of February 19, 1889, embraces but 837 acres. The Hoh reservation created by Executive Order of September 11, 1893, embraces 640 acres. The Ozette Reservation, created by Executive Order of April 12, 1893, embraces a similar area. These Indians are fishermen rather [299] than agriculturists and to promote the fishing industry had congregated in villages at different points favorable to the pursuit of their chosen occupation. Undoubtedly, therefore, these small tracts of land were withdrawn, not as a reservation to provide for the tribe at large with a view of authorizing allotments thereof to the Indians, but simply to protect the Indians in the location of their homes in these village sites. This is clearly shown because the Quileute Reservation comprises but 837 acres, while the population on June 30, 1911, was given as 225 members—less than four acres per Indian. It would seem, therefore, that unquestionably a perusal of the Executive Order of November 4, 1873, enlarging what is now called the Quinaielt Reservation indicates that the intent of that Executive Order was to provide a reservation on which permanent homes could be given members of the "Quinaielt, Quileute, Hoh and Quit Indians," if not also, "other

tribes of fish-eating Indians on the Pacific Coast."

The Act of March 4, 1911, supra, authorizes and directs the Secretary to allot on the Quinaielt Reservation all members of the "Hoh, Quileute, Ozette or other tribes of Indians in Washington, who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's correction) 1856." This, of course, removes any doubt as to the right of the Indians of the particular tribes mentioned to allotment on the Quinaielt Reservation, regardless of the fact that small separate reservations may have been made for these tribes by the executive orders hereinbefore referred to. It still leaves unsettled, however, the main question at issue and which is now before the Office, viz., the right of other fish-eating Indians on the Pacific Coast to allotment on the Quinaielt Reservation in view of the treaties referred to herein and the provisions of the Executive Order of November 4, 1873.

The question may be seriously considered at this time whether the Act of March 4, 1911, supra, was necessary. That is, whether authority did not already exist under the treaties mentioned and the Executive Order of November 4, 1873, to allot on the Quinaielt Reservation Indians of the tribes specifically mentioned in the Act of March 4, 1911. It is not seen, therefore, how this

act can be construed or regarded as in abrogation of or placing any limitation on the rights of various so-called fish-eating Indians of the Pacific Coast to allotments on the Quinaielt Reservation. The act should be read in conjunction with the prior treaties and the executive orders rather than using it as a basis for excluding from allotment on the Quinaielt Reservation members of the fish-eating tribes not specifically named in its provisions or who cannot be shown as clearly coming within the phrase "or other tribes of Indians in Washington, who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's [300] correction) 1856."

* * * * * * *

House bill 22868, introduced April 4, 1912, but which has not yet been referred to the Department for report so far as this Office has been advised, is designed to authorize allotments on the Quinaielt Reservation to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute and other fish-eating Indians in the State of Washington. In view of the treaties, executive orders and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the

Quinaielt Reservation and that further legislation is unnecessary.

March 5, 1913, the Department concurred in the views expressed by the Indian Office that the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, and other fish-eating Indians of the Pacific coast are entitled to allotments on the Quinaielt reservation under existing laws.

In reply to an informal inquiry as to whether or not departmental approval of March 5, 1913, of Indian Office recommendation of January 4, 1913, authorized allotments on the Quinaielt reservation to members of the Tulalip tribe, the Indian Office, on March 19, 1913, advised that said recommendation was not with the view to permitting such allotments, and that the approval did not grant such authority. It was further stated:

> The Lummi, Snohomish or Tulalip Indians and other tribes under the Tulalip superintendency, were parties to the treaty of Point Elliott dated January 22, 1855 (12 Stat. L., 927). As the result of this treaty a reservation of sufficient size was set aside to provide for the Tulalips. Allotments were made some years ago to all Tulalips then entitled and the Office would not be justified in construing the approval of the Department to allot "fish-eating" Indians of the coast, as authorizing allotments on the Quinaielt Reservation to members of the

Tulalip tribe born since the reservation established for these Indians was allotted.

In Indian Office letter of May 5, 1913, to the Superintendent of the Cushman School, referring to letter of that office of January 4, 1913, approved by the Department March 5, 1913, and requesting rules to guide in determining eligibility of allotment on the Quinaielt reservation, it was said:

> It is clear from the said authority of the Department of March 5, 1913, that the Indians to be provided with homes on the Quinaielt Reservation are those unallotted individuals or members of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute and other "fish-eating Indians of the Pacific Coast." [301]
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> * * * * * *
>
> In this connection your attention is invited to Office letter of August 28, 1911, approved by the Department October 14, 1911, in which you were advised at length concerning the requirements in regard to enrolling Indians of the Hoh, Quileute, Ozette and other tribes in order that they might be provided with homes on the Quinaielt Reservation. The instructions in this letter should be followed so far as may be practicable in making the enrollment indicated.
>
> Of course those members of the tribes mentioned who have heretofore received allotments elsewhere are not to be included

in the enrollment which you are to make; and where homeless bands or individuals are found who are clearly entitled to allotments there, they should be induced, where practicable, to remove to the Quinaielt Reservation in order to make their homes on the lands to be allotted them.

April 4, 1914, the supervisor in charge of the Cushman School was authorized by the Indian Office to call a council for the purpose of aiding the Clallam Indians in applying for enrollment and allotment with the Indians of the Quinaielt reservation, and was at the same time advised as follows:

> It should be understood at this time, however, and all Indians interested should be advised accordingly, that under the provisions of the 6th article of the Treaty of July 1, 1855 (12 Stats., 971), only those members of the Clallam, Squixin (Squaxon) (Court's correction) Island, Port Gamble, and "other fish-eating Indians" of the Pacific Coast who actually remove to and establish homes on the Quinaielt Reservation, will be entitled to share in the benefits of that reservation, either land or money.

It will be observed that the matter submitted by the Indian Office herein is about as nearly covered by the instructions and correspondence of the Department and that office, extending over many years, as it is possible with any reasonable degree of certainty to cover the same in a for-

mal opinion in the absence of further legislation. There is apparently no valid reason for establishing at this time a different policy or mode of procedure from that heretofore pursued under such laws. It is a warrantable conclusion from the construction thus placed upon existing laws in said instructions that not all the Indians of western Washington are entitled to enrollment and allotment with the Indians of the Quinaielt reservation; that the term, "fish-eating Indians of the Pacific Coast," was not intended to include all tribes and bands west of the Cascade range, as has been contended, but applies only to those Indians of the Pacific Coast "south of Neah Bay or Makah reservation to the mouth of the Columbia River"; that only those Indians whose tribes or bands were parties to the treaty of 1855 and 1856, or are members of the tribes or bands named in Executive Order of November 4, 1873, and the Act of March 4, 1911, or are [302] found to be in affiliation with the Indians of Quinaielt reservation, and who have not received allotments on the reservations of their respective tribes or bands; and, furthermore, who remove to and take up their residence on said reservation as indicated by Article 6 of the treaty of 1855-1856, are entitled to enrollment and allotment on that reservation.

While the Quinaielt reservation is one of the largest west of the Cascade range, it was evidently not intended that all the unattached Indians as far east as that range could secure rights on that reservation. The more reasonable view

is that only the Indians of the tribes or bands on the immediate coast of Washington and those affiliated therewith were contemplated. The applicants represented by Mr. Bishop alone and belonging to more than 40 different tribes or bands are said to amount to more than 2000, and the number may reach 3000.

It may be stated here that the word, "affiliated," was apparently intended to refer to the tribe rather than to the individual. The individual Indians affiliated with the tribes on the Quinaielt reservation would have been entitled to allotment there without further legislation. Therefore, the Act of March 4, 1911, could not have been passed for the purpose of declaring rights already existing. The Hohs and Ozettes mentioned in the Act, as well as other tribes in western Washington, have specific reservations set apart for them, and the members thereof in taking allotments would be limited to those reservations but for the Act of 1911. The Indian tribes along the Pacific coast of Washington, described as "fish-eating Indians," are more or less affiliated, although divided into numerous tribes or bands.

It necessarily follows that in determining what Indians are entitled to rights on the Quinaielt reservation, a satisfactory showing must be made in the case of each individual applicant for enrollment and allotment, and that the requirements of such showing can very properly be governed by the same instructions contained in and that may be formulated in accord-

ance with the instructions and correspondence already had in the premises, and especially the instructions issued by the Indian Office to the Superintendent of Cushman School, which were approved by the Department October 14, 1911.

Respectfully,

ALEXANDER VOGELSANG,

Sep 12 1916 Solicitor."

It is clear that the words of the Executive Order of November 4, 1873, "to provide for other Indians in that locality" and "other tribes of fish-eating Indians on the Pacific Coast" and the words of the Act of March 4, 1911, "other tribes of Indians in Washington who are affiliated [303] with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, (twenty-fifth) (Court's correction) eighteen hundred and fifty-six," do not include Indians of the tribes on the Straits of Fuca, Admiralty Inlet or those on Upper or Lower Puget Sound, for while they may be "fish-eating Indians" they are not "fish-eating Indians of the Pacific Coast" nor "Indians in that locality" within the meaning of the Executive Order nor "affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third," (Twenty-fifth) (Court's correction) "eighteen hundred and fifty-six" within the meaning of the Act of March 4, 1911. (John Mitchell et al., v. U. S., (No. 242-E, this court)).

Members of the Makah tribe, other than the

Ozettes, are not entitled to allotment for while they are "fish-eating Indians of the Pacific Coast" they were parties to the prior treaty of January 31, 1855 and therefore are not "Indians in that locality," within the meaning of the Executive Order, nor of "tribes * * * affiliated with the Quinaielt and Quileute tribes * * *" in the making of their treaty as provided in the Act of March 4, 1911. The Ozettes are only entitled to allotments because they are expressly named in the Act.

While the foregoing Indians are not entitled to allotments the question remains as to what Indians, other than the Quinaielts and Quillehutes, named in the treaty, are entitled thereto under the Executive Order and the Act of March 4, 1911.

The Court concludes that Indians of the Chehalis —Upper and Lower—, Chinook, Cowlitz and so-called "Shoalwater Bay" bands are entitled to allotments. [304]

It will be noted from the foregoing opinion of the Solicitor for the Department of the Interior that the Superintendent of Indian Affairs for Washington Territory in recommending the enlargement of the reservation described in the treaty said:

> "All the tribes made parties to this treaty, together with the remnants of the Chehalis, Humptulups, Shoalwater Bay, and Chinook tribes residing along this coast south of the reservation to the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish-e ters, and draw their subsistence almost wholly from the water,

and therefore have but little taste or desire to agricultural or land productions.

* * * * * * *

* * * * * *

"The reservation thus enlarged would afford two more fisheries on the Pacific Coast, and perhaps several others around Lake Quinaielt, and would afford occasional patches of agricultural and grazing lands, and upon it should be collected not only the three tribes named," (Quilliutes, Hohs, and Quits) "but also all the other tribes and bands of fish-eating Indians on the Pacific coast, from the south side of Neah Bay reservation to the mouth of the Columbia River; all of whom could find room and homes on this enlarged reservation."

The Indian Office did not adopt the recommendation of the Superintendent of Indian Affairs, "that on the enlarged reservation should be collected not only the Quilliutes, Hohs and Quits, but also all the other tribes and bands of fish-eating Indians on the Pacific Coast, from the south side of Neah Bay reservation to the mouth of the Columbia River" but instead recommended the enlargement of the reservation so that the "Hohs, Quits and other fish-eating Indians residing upon the coast between the Quinaielt river and Makah Indian reservation may be induced to go upon the reservation," nor did the Executive Order follow the recommendation of the Indian Office, nor did it, in exact language, follow that of the Superintendent of Indian Affairs for Washington Territory, but the order did enlarge the reser-

vation "to provide for other Indians" viz: other than Quinaielt and Quillehute, "in that locality" and the land [305] was thereby "ordered set apart for the use of the Quinaielt, Quillahute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast."

The Act of March 4, 1911, in directing allotments, described, in still different language, the Indians to be allotted, as follows:

> "all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third," (twenty-fifth) (Court's correction) eighteen hundred and fifty-six."

It would appear, without other aid to interpretation than that afforded by the treaty, executive order, act of March 4, 1911, recommendation of the Superintendent of Indian Affairs for Washington Territory and the recommendation thereon of the Indian Office, that while the intent of the Executive Order and Act of 1911 may have been to include Indians in addition to those of the Chehalis, Cowlitz or Chinook, both contemplated allotments to members of such tribes, included in which would be the Indians of the Shoalwater Bay settlement.

In the case of Montoya v. United States, 180 U. S. 261, the court said: (page 266)

> "* * * We are more concerned in this case with the meaning of the words "tribe" and "band." By a "tribe" we understand a body of

> Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership and concert of action."

The evidence in the present case indicates that the [306] Indians at Chinook, Dahlia, Shoalwater Bay and Oakville have no tribal organization. They are, as the witness Bush says of the Indians at Shoalwater Bay, "remnants of bands and tribes." The Superintendent of Indian Affairs for Washington Territory, in recommending the enlarged reservation, said: "all of the tribes made parties to this treaty, together with the remnants of the Chehalis, Humptulups, Shoalwater Bay and Chinook tribes, * * *." They still cling together at and about the old haunts of the former tribal organization and are therefore "tribes" within the meaning of the Executive Order and Act of March 4, 1911. In the Montoya case, supra, the tribal characteristic of one leadership of government and the band characteristic of one leadership in a common design or concerted action is

pointed out by the court. This characteristic in so far as the groups of Indians above-named in the present case, is, save as pointed out, wanting, as there is no tribal organization. But it should be borne in mind in considering the language of the court above quoted from the Montoya case, that the court was considering the question of tribal action or the action of a band as distinguished from the individual action of members of a tribe or band. To such action leadership would be essential. The court was not considering the question of surviving membership in a vanishing tribe.

The present is not a case under the General Allotment Act. It is a case arising under a special allotment act, that of March 4, 1911, and the Executive Order of November 4, 1873, applicable to particular Indians shown to be and have been without tribal organization, which fact it must be inferred was considered in making the Executive Order, for that order was made upon the recommendation of the Superintendent of Indian Affairs for Washington Territory, a part [307] of which recommendation recited not that these were members of organized bands or tribes but that they were the "remnants" of tribes. The Indian Office has evidently recognized that something more than organized tribes with a governmental leadership was contemplated. This is indicated in a portion of the letter of January 4th, 1912 quoted by the Solicitor:

> "The statement from the chiefs and head men of the Quinaielt and Quileute, however, as to what tribes, bands or *villages* were affiliated with them in the treaty would have weight with the

> Office in determining the rights of such other tribes, bands or villages." (Italics the court's)

It is apparent difficulty has been experienced in determining the meaning of the words of the Act of March 4, 1911:

> "Other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third," (twenty-fifth) (Court's Correction) eighteen hundred and fifty-six."

It is not unlikely that the words "in Washington" were inserted because of the Chinook, who, while they "claimed the territory on the north side of the Columbia River from the mouth to Grays bay, a distance of about fifteen miles, and north along the seacoast as far as the northern part of Shoalwater Bay," (Handbook of American Indians, Bureau of American Ethnology, Bulletin 30, Part I, page 272) yet it would appear from the Solicitor's opinion that certain of the Chinooks may have lived in Oregon as the Indian Office in 1906 questioned the right of the Chinooks to allotments on the Quinaielt reservation in part because:

> "it is asserted that at one time they" (Chinooks) "were all on the Silotz" (Siletz) "and Grande Ronde Indian Reservations."
>
> (Brackets the Court's)

The words, "fish-eating Indians of the Pacific Coast," were probably omitted from the Act of March 4, 1911, because [308] of the contention that the

Cowlitz and Upper Chehalis, while "fish-eating Indians," not being directly upon the coast, were, therefore, not "fish-eating Indians of the Pacific Coast."

The Act of March 4, 1911 instead of these words used the expression "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third," (twenty-fifth) (Court's correction) "eighteen hundred and fifty-six." It will be noted that the word used is "are" and not "were," yet the Indian Office has construed the word as "were," which is shown by the Opinion of the Solicitor in setting out the instructions of August 23, 1911, approved by the Department October 14, 1911, and the instructions from the Indian Office to the Superintendent of Cushman School on January 4, 1912. This construction is doubtless proper. (Words & Phrases, 1st Series, "are" citing Barzizias v. Hopkins & Hodgson, (Va) 2 Rand. 276, 293)

Trouble appears to have been experienced in construing and applying the word "affiliated" as it is used in that part of the Act of March 4, 1911, reading as follows:

> "* * * to all members of the * * * or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty * * *"

There were no Indians, other than the Quinaielts and Quillehutes, actually signing the treaty on the Quinaielt River July 1, 1855, negotiations for which had been held on the Chehalis River in February of

that year. The last signor, Hay-et-lite-'l, or John, may have been a Chehalis. The testimony is that he was a Gray's Harbor Indian. The fact, while it may show that the lines separating these bands or tribes were not distinct, is otherwise of no aid in determining the question presented. [309]

Mr. Swan, who was present on the treaty ground upon the Chehalis in February, 1855, says in his book, "The Northwest Coast; or, Three Years' Residence in Washington Territory," published in 1857, Chapter XIX, page 346:

> "The whole together only numbered 843 all told, as may be seen by the following census, which was taken on the ground:
>
> | | |
> |---|---|
> | Lower Chehalis | 217 |
> | Upper do | 216 |
> | Queniults | 158 |
> | Chenooks | 112 |
> | Cowlitz | 140 |
> | | 843"

Again he says, at page 337:

> "Around the sides of the square were ranged the tents and wigwams of the Indians, each tribe having a space allotted to it. The Coast Indians were placed at the lower part of the camp; first the Chenooks, then the Chehalis, Queniult and Quaitso, Satsop or Satchap, Upper Chehalis, and Cowlitz"

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 141

HILARY HALBERT, JR., DOROTHY HALBERT RUBBLE, MILDRED HALBERT, A MINOR, ETC., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 142

RICH HALBERT, A MINOR, BY FRED P. HALBERT, GUARDIAN AD LITEM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 143

VERNON SIDNEY HALBERT, A MINOR, BY BENJAMIN F. HALBERT, GUARDIAN AD LITEM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 144

SIDNEY E. HALBERT, A MINOR, BY SIDNEY SETH HALBERT, GUARDIAN AD LITEM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 145

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE, AND AMELIA PEERS ALDEN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 146

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, ETC., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 147

MARY BARICHIO PETIT AND NORRIS PETIT, ELLIS A. PETIT, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

It is evident that, in his own classification, the author, in designating Quaitso and Satsop, was making a distinction not made in the census.

The word "treaty" has two meanings:

> "1. The act of treating for the adjustment of differences, as for forming an agreement; negotiation.
>
> * * * * * * *
>
> 2. An agreement so made; specifically, an agreement, league, or contract, between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns, or the supreme power of each state; an agreement between two or more independent states; as, a treaty of peace; a treaty of alliance."
>
> (Webster's International Dictionary)

The word "treaty" doubtless has a third meaning—a meaning broad enough to include both the preceding negotiations and the writing—the signed treaty. It is often necessary in construing written contracts to consider prior negotiations in order to determine the meaning of the writing. Such necessity shows that the negotiation is, to such extent, a part of the contract. There is a clear instance of this in the present treaty. [310]

Article 3 of the treaty secures to the Indians the right to take fish at all usual and accustomed grounds and stations. Concerning this there can be no question, but, if there were discussions upon the treaty ground as to the location of these "usual and accustomed grounds and stations" that fact could be proved

in a suit under the treaty as showing what the agreement was in such respect. It is evident that the word "treaty" was, in the Act of March 4, 1911, used in this broader sense for in no other way (unless the word "and" occurring in the Act as one of the words "Quinaielt and Quileute" be construed as though it was the word "or") can the words "other tribes of Indians in Washington who are affiliated with the Quinaielt and the Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-fifth, eighteen hundred and fifty-six" be given any meaning.

The construction of the word "and" in writings as though it were the word "or" is some times required in order to give effect to the true meaning. (Bouvier's Law Dictionary, Vol. I, page 194, "and," citing United States v. Fish, 3 Wall. (U. S.) 445; Brown v. Furniture Co., 58 Fed. 286) The word "or" also appears in this act in the following:

> " * * * Secretary of the Interior * * * is hereby authorized * * * to make allotments * * * to all members of the Hoh, Quileute, Ozette *OR* other tribes of Indians in Washington, * * *" (Italics the court's)

The word "or," as it appears in the foregoing, doubtless should be construed to read as though it were the word "and."

It is, however, more reasonable to conclude that the word "treaty" in the Act was used in the broader sense including the written treaty and the negotiations in the preceding February. So construed the Chehalis, Cowlitz and Chinook, who were upon the treaty

ground, were affiliated with both the Quinaielts and Quillehutes in the treaty. [311] While perhaps not full brothers with them in this matter they can be said to have been affiliated with them in the treaty without straining the words of the Act. The Solicitor, in concluding his opinion, says:

> "The Indian tribes along the Pacific Coast of Washington, described as "fish-eating Indians," are more or less affiliated, although divided into numerous tribes or bands."

Is it not in this wider sense that the word "treaty" is used in Section 10, Article I of the Constitution of the United States, providing:

> "No state shall enter into any treaty, alliance, or confederation * * *"?

It has been contended in these cases that in the absence of an adoption by the tribe, approved by the Secretary, recognition by representative members of the tribe of membership in the tribe was necessary to the allotment right. While recognition by representatives of the Quinaielt and Quillehute tribes of membership or rights to allotment, being against interest, would be most persuasive, if not controlling, yet, insofar as the Chehalis, Cowlitz and Chinook are concerned it is not a sine qui non, for the headmen of the Quinaielt and Quillehute tribes can not be expected to have any peculiar knowledge concerning the membership of these other tribes here in question which—other than the Cowlitz—have no tribal organization. If they had the court could look to it in determining a question of tribal recognition.

Cases No. 299, 300, 301 and 302.

In the Complaints in these four cases it is alleged that plaintiffs are the children of four brothers. In case No. 300, it is alleged that plaintiff resides with his father and mother upon the Quinaielt Indian reservation and that [312] they have so resided for many years. In each case it is alleged that plaintiffs and the fathers of each were born and have lived all of their lives and now live in Grays Harbor county, Washington (the county in which substantially all of the Quinaielt Indian reservation lies), and that they have lived and associated and affiliated with the Quinaielt Indians during that entire period. In the three last numbered cases it is alleged that plaintiffs, who sue through their guardian ad litem, now each resides with his father. In each of the four cases it is alleged that the father has been duly enrolled and allotted on the Quinaielt Indian Reservation; that the paternal grandmother and four paternal uncles and other persons more distantly related to plaintiffs have received allotments upon said reservation.

Defendant admits that the father of each of the plaintiffs in said suits is enrolled and allotted upon the Quinaielt Indian reservation and that the other relatives of plaintiffs have been allotted on the reservation as alleged.

The major contention of defendant in these cases is that plaintiffs are to be classified as Indians of the "Upper Chehalis" and not of the "Lower Chehalis," it being admitted by the defendant upon the trial that if of the "Lower Chehalis" they were entitled to allotments.

The great-grandmother of the plaintiffs, an Indian woman, lived, it may be assumed, on the upper Chehalis river. Her daughter, (whose father was a white man), the grandmother of plaintiffs, was born in the Upper Chehalis Indian settlement of Oakville, which is about thirty miles from Grays Harbor. This daughter married a white man and they resided for many years and until her death near Hoquiam on Grays Harbor, about twenty-five miles from the Quinaielt Indian reservation. [313] The Handbook of American Indians, Bureau of Ethnology, Bulletin No. 30, Part I, page 569, describes Hoquiam as "a Chehalis Village." There was undisputed testimony that the grandmother lived in the Indian village. The duration of such residence is not shown. The Indian Agency is now located at Hoquiam.

There was born to plaintiffs' grandmother, of this union, four sons. They were all born at Hoquiam prior to 1886. They, with their families, have lived in and about Hoquiam throughout their lives associating with other Indians. The plaintiffs are the children of these four sons, their mothers being white.

It being admitted by the defendant that the plaintiffs are Indians and the evidence showing that they are Chehalis Indians, because of the conclusion already reached upon the main question in these cases, the court does not find it necessary to determine whether they are Upper or Lower Chehalis.

The plaintiffs in these cases are entitled to allotments.

Cases No. 312, 324, 325 and 326.

In the Complaints it is alleged that the plaintiffs in these four cases are related in a manner similar to that in the first four cases considered, that is, each is the child of one of a family consisting of a sister and her three brothers.

In case No. 312 it is alleged that the plaintiffs are minors of part Indian blood and, with the exception of Norma C. Elliott, were born and reared in Wahkiakum County, Washington; that the family there made its home the greater part of their lives; that the father and mother of plaintiffs are enrolled and allotted Indians on the Quinaielt Indian [314] reservation; that the father, guardian ad litem of the plaintiffs, is a fisherman fishing in the Columbia River on both banks thereof, at present making his home at Astoria, Oregon until such time as he shall remove to the Quinaielt reservation where he and the mother of said minor children have been recently given an allotment of land; that the maternal and paternal grandmother of plaintiffs and fifteen maternal uncles and aunts of plaintiffs and numerous cousins and more distant relatives have been recognized by defendant and enrolled and allotted. The foregoing allegations are admitted by the defendant.

In case No. 324 it is alleged that the father of plaintiffs is an enrolled and allotted Indian on the Quinaielt Indian reservation; that plaintiffs were born and reared in Wahkiakum County at the Indian settlement of Dahlia; that the father and all of the plaintiffs have at all times since their birth continuously lived as Indians and associated and affiliated with the Quinaielt Indians and associated

and affiliated tribes and bands of Indians, and are fish-eating Indians of the Pacific Coast; that the defendant has recognized, enrolled and allotted not only the father of plaintiffs but their paternal grandmother and eight paternal uncles and aunts. These allegations are admitted by the defendant.

In case No. 325 plaintiffs allege they are minor persons; that their father is Charles G. Elliott; that he is a duly enrolled and allotted Indian on the Quinaielt Indian reservation; that all of the plaintiffs were born and reared in Wahkiakum County, Washington and now reside therein at the Indian settlement of Dahlia; that Charles G. Elliott and all of the plaintiffs have at all times since their birth [315] continuously lived as Indians and associated and affiliated with the Quinaielt Indians and associated and affiliated tribes and bands of Indians and are fish-eating Indians of the Pacific Coast. All of the foregoing is denied by the defendant except that defendant admits Charles G. Elliott was enrolled and allotted land on the Quinaielt Indian reservation by decree of this court.

Plaintiff further alleges that defendant has recognized many members of Plaintiff's family and has enrolled and allotted many members of said family in addition to plaintiffs' father, being their paternal grandmother and eight paternal uncles and aunts. These allegations are admitted by the defendant.

In case No. 326 the Complaint alleges that plaintiffs are of part Indian blood; that four of them are over twenty-one years of age and the remaining two are minors. These allegations the defendant admits.

It is further alleged in the complaint that the

mother of plaintiffs is a duly enrolled and allotted Indian of the Quinaielt Indian Reservation and that all of the plaintiffs were born and reared in Wahkiakum County, Washington and reside therein at the Indian settlement of Dahlia, with the exception of Mary Henry Hagen, who now resides at Hoquiam in Grays Harbor county; that the plaintiff Louise E. Henry and all of the plaintiffs herein have at all times since their birth continuously lived as Indians and associated and affiliated with the Quinaielt Indians and associated and affiliated tribes and bands of Indians, and are fish-eating Indians of the Pacific Coast. The defendant admits that the mother of plaintiffs is named Louise E. Henry and that she is an enrolled and allotted Indian on the Quinaielt Indian reservation. The other foregoing allegations are denied. [316]

In the complaint it is further alleged by the plaintiffs that the defendant has recognized many members of plaintiffs' family and has enrolled and allotted many members thereof, among whom are not only the mother of plaintiffs, but the maternal grandmother and eight maternal uncles and aunts. These allegations are admitted by the defendant.

In the complaint it is further alleged that plaintiffs are full blood brothers and sisters. This allegation is denied.

The facts in these four cases do not distinguish them from the decision reached by this court in case No. 272-E of the causes in this court. In that case the court decided that the mother of the plaintiffs in the present case No. 326 and the fathers in the other three cases and Agnes Elliott, the grandmother of

plaintiffs in all such cases, were entitled to allotments on this reservation. In that case the court called attention to the fact that the tribal council of the Quinaielt Indians convened on April 4th, 5th and 6th, 1912, considered not only the adoption of Agnes Elliott and her four children but twenty-eight of her grandchildren. The record of that proceeding in this particular is as follows:

> "* * * * The case of Agnes Elliott's grandchildren was next presented to the council. Agnes Elliott, who has been adopted into the tribe in an earlier part of the council proceedings, appeared and applied for her grandchildren. In as much as this woman was adopted, the members wished to vote on her grandchildren without discussion.
>
> The Superintendent presented the following for adoption: * * * * * Vote: 34 for adoption, and 0 for rejection."

The names of plaintiffs in the present four suits are placed below in the left-hand column and the names of certain of those of the grandchildren of Agnes Elliott shown by the adoption record of the council to have been voted upon favor- [317] ably. are placed in the column to the right:

(Case No. 312)

Lulu M. Elliott,	Louella Elliott, age 4 years,
Sophie M. Elliott,	
Carolyn M. Elliott,	
Marion E. Elliott,	
Emma S. Elliott,	
Norma C. Elliott.	

No names corresponding to the plaintiffs Sophie M. Elliott, Carolyn M. Elliott, Marion E. Elliott, Emma S. Elliott and Norma C. Elliott appear in the adoption proceedings.

(Case No. 324)

Edna May Elliott,	Edna Elliott, age 14 years,
Ruth G. Elliott,	Ruth Elliott, age 9 years,
William H. Elliott,	William Elliott, age 6 years,
John G. Elliott,	Jonathan Elliott, age 4 years,
Frank L. Elliott,	
Jewell M. Elliott.	

No names corresponding to the plaintiffs Frank L. Elliott and Jewell M. Elliott appear in the adoption proceedings.

(Case No. 325)

Chas. G. Elliott, Jr.,	Charles Elliott, age 1 year,
Anna Marie Elliott,	Anna Elliott, age 3 years,
Henry Elliott,	
Ralph G. Elliott,	
Frances Elliott.	

No names corresponding to the plaintiffs Henry Elliott, Ralph G. Elliott and Frances Elliott appear in the adoption proceedings.

(Case No. 326)

Agnes Rubens,	Agnes Henry, age 20 years,
Louise Henry Peterson,	Louise Henry, age 15 years,
Mary Henry Hagen,	Mary Henry, age 12 years,
Chris Henry, Jr.,	Chrissie Henry, age 6 years,
Christine Henry,	Christine Henry, age 2 years.
June Henry.	

No name corresponding to the plaintiff June Henry appears in the adoption proceedings.

The court finds that the names placed opposite one another above designate the same individuals. It has been sixteen years since this action was taken by the tribal council. The [318] court concludes that the plaintiffs whose names do not appear upon the record of adoption were born since the action taken by this council. If such is not the fact evidence may be offered upon that point at the settling of the decree.

The plaintiffs in these cases are entitled to allotments.

Cases No. 320 and 321.

In these two cases the minor plaintiffs are alleged in the one case, with the exception of Oscar Brignone, to be the children of the plaintiff, Mary Barichio Petit, and in the other case to be the children of the plaintiff, Dewey Barichio, a brother of Mary Barichio Petit. In each case plaintiffs allege they are of part Indian blood, which allegation is admitted in the answer of the defendant.

It is further alleged in the Complaint that the plaintiff, Mary Barichio Petit, is the aunt of the plaintiff, Oscar Brignone; that Mary Barichio Petit is a Quinaielt Indian by blood and the wife of Paul Petit, the guardian ad litem of the minor plaintiffs, who is a duly enrolled and allotted Indian on the Quinaielt Indian Reservation; that all of the plaintiffs were born and reared and now live in Pacific County, Washington, near Bay Center, in this district, and have always lived, associated and affiliated with the Indians of this locality and other Quinaielt Indians and have always been considered as Indians in this locality; that Paul Petit has recently been allotted upon the Quinaielt Indian Reservation and expects

to make his home thereon with his family when the land has been cleared and a home established thereon.

It is further alleged that many members of the family of plaintiffs have been recognized and allotted upon the Quinaielt Indian Reservation; that not only has Paul Petit been allotted, but also Frank G. Barichio, father of the [319] plaintiff, Mary Barichio Petit, and grandfather of her two children, plaintiffs herein, the grandmother of plaintiff Mary Barichio Petit, an uncle and aunt and cousin of the plaintiff Mary Barichio Petit, and many other relatives of plaintiffs on their father's side. These allegations are in the answer denied.

It is alleged in this complaint that the plaintiff Dewey Barichio is the father of the other minor plaintiffs, Leda A., Romie D. and Andrew B. Barichio; that their mother, the wife of plaintiff Dewey Barichio, is a duly enrolled and allotted Quinaelt Indian; that all of the plaintiffs were born and reared and now live in Pacific County, Washington, near Bay Center, within this district, and have always lived, associated and affiliated with the Indians of this district and other Quinaielt Indians and have never been considered except as Indians in this locality; that the mother of the minor plaintiffs, wife of plaintiff Dewey Barichio, has been recently allotted within the Quinaielt Indian Reservation and expects to make her home thereon with her family when the land has been cleared and a home established thereon. These allegations are by the defendant in its answer denied.

It is further alleged in the complaint that the plaintiffs have many members of their family allotted upon

the Quinaielt Indian Reservation, not only the mother of the minor plaintiffs, wife of the plaintiff Dewey Barichio, but the father of the plaintiff Dewey Barichio and that defendant has recognized and allotted many other members of plaintiffs' family upon said reservation. These allegations are by the defendant in its answer admitted.

There is no evidence that Indians, other than the Chehalis, Chinook and possibly the Quinaielt, occupied the region about Bay Center before the treaty. The defendant [320] contends that the Quinaielt did not. It is certain that they visited it regularly and frequently. If the manner of living of these tribes be kept in view the testimony can, to a great extent, be reconciled. These Indians did not abide in one place. They moved about following the fish, the game, the fur-bearing animals, gathering berries in one or more places and camas in others and finding shelter in the winter elsewhere. Such barter as they carried on before the coming of the whites must have been with the Indians of the Interior by way of the Columbia River to the mouth of which the Coast Indians must have gone for that purpose, as in the nature of things they would be more skillful in handling canoes upon the ocean than the Indians of the interior. In going to the Columbia to trade and fish or for other purposes the Quinaielt Indians would pass Shoalwater Bay. The mixed character of the Indian settlement on Shoalwater Bay is, in part, no doubt accounted for because of the existence there of oyster beds. Owing to this roaming there could be no great tenacity in any local tenure of theirs. One who had opportunities to observe the Indian life

which we of the present generations have not had suggested, if he did not describe, the nature of their title or claim to the land when, in substance, he said "They have seen it from the mountain; they have passed it in the chase." The plaintiffs are fish-eating Indians of the Pacific Coast. The Indian blood is predominant in their ancestors. They and their families and the families of their ancestors for four generations have resided on Shoalwater Bay, the northerly part of which is about forty miles south of the Quinaielt reservation. Members of this family through three generations have been allotted on the Quinaielt Indian Reservation. The grandfather of plaintiffs, other than of Oscar Brignone, says [321] his allotment was made without his adoption.

There is and has been since before the treaty an Indian settlement on Shoalwater Bay. By Executive Order of September 22, 1866, a reservation of one-half square mile was created here, described as "occupied by Shoalwater and Chehalis." (Kappler, Vol. I, page 924.)

The white witness, Bush, sixty-one years old, who has lived at Bay Center on Shoalwater Bay for fifty-one years and says he has known most of the Indians around Shoalwater Bay for fifty years, describes them as an aggregation of the remnants of tribes; that there were Chinooks, and Willopahs, the latter a tribe of the Chinook, (Handbook of American Indians, Part II, Page 955) Chehalis and Satsop, the latter a tribe, the easternmost of the Lower Chehalis (idem, p. 470).

The defendant contends that the plaintiffs are detached Indians, that is, members of no tribe.

The witness, Johnson, testifies that other than the

Cowlitz, these tribes had no organization. The witness, Bush, states that there is no tribal organization but the last few years there has been sort of a business organization.

It is probable that the plaintiffs should be classed as Chehalis, as defendant has classed their common ancestor, but on account of the conclusion reached it is not necessary to determine whether these plaintiffs should be classified as Chehalis, Chinook or Quinaielt. The preponderance of the evidence is that they and their Indian ancestors are Indians of a settlement of Chehalis, Chinook and Quinaielts.

The evidence establishes their right to allotments.

Case No. 313.

In the complaint in this case it is alleged that the plaintiff is a person of part Indian blood. This is not denied by the defendant in its answer. [322]

It is further alleged that the plaintiff is a minor child, two years of age, the daughter of Frances James Payne, a duly enrolled and allotted Indian on the Quinaielt Indian Reservation; that plaintiff was born in Aberdeen, Grays Harbor County, Washington, within this district, and has continuously resided either at Aberdeen or Taholah, Grays Harbor County, Washington, within this district; that the father of this plaintiff is a white man named Frank Payne. The defendant in its answer denies that plaintiff was ever a resident of Taholah (which is on the Quinaielt Indian Reservation). The other allegations are admitted.

It is further alleged in the complaint that Frances James Payne, the mother of plaintiff is a duly en-

rolled Quinaielt Indian allotted on said reservation; that the mother of plaintiff's mother is a duly enrolled and allotted Indian on the Quinaielt Reservation; that plaintiff's mother has five sisters enrolled and allotted on said reservation and has many nieces, nephews, uncles, aunts, cousins and more distant relatives allotted and enrolled upon said reservation. These allegations are in the answer admitted by the defendant.

It is further alleged in the complaint that the mother of plaintiff owned and maintained a home at Taholah upon the reservation long before the birth of plaintiff; that she owned and maintained this home during the past two years and still owns and maintains it where since the birth of the plaintiff she has spent over one-half of her time constantly associating and affiliating with the Quinaielt tribe of Indians. The defendant in its answer denies these allegations.

The facts in this case are virtually agreed upon by the parties. Plaintiff's father is a white man who married plain- [323] tiff's mother, an Indian, three years "or a little better" before the trial of this case in January, 1928, long subsequent to the Act of June 7, 1897.

It is admitted that the mother, if present, would testify that she owned and maintained a home at Taholah, upon the Quinaielt Indian Reservation, long before the birth of the plaintiff; that she owned and maintained this home during the two years preceding November 10, 1927 and that ever since the birth of the plaintiff on January 9, 1925 she spent over one half of her time at said home constantly affiliating and associating with the Quinaielt tribe of Indians.

Witness Harry Shale, headman of the Quinaielt tribe, testified that he knew plaintiff's mother; that she was married and moved from Taholah to Aberdeen where she and her husband live and that she has not been back; that he has not seen the plaintiff; plaintiff's father works in a mill at Aberdeen, some twenty-six or twenty-seven miles from the South border of the Quinaielt Indian Reservation; that he had a house in Aberdeen before the child was born where the mother lived before and since the child was born; that since the marriage he has seldom seen her at Taholah; that she made a few trips there to visit her mother; that she lived practically all her life, until she married plaintiff's father, at Taholah.

Another headman of the Quinaielts testified that plaintiff's mother has not been at Taholah since she was married.

There is no substantial difference between the facts in this case and that of Eugene Pape in Case No. 218-E decided by this court except that while Pape and his parents resided at Tacoma, outside of the territory formerly occupied by these Indians, in the present case the parents reside and have resided at Aberdeen on Grays Harbor, within the terri- [324] tory formerly occupied by the Chehalis, but that fact alone is not sufficient to distinguish the cases and the plaintiff has not maintained the burden of showing that his status is other than that of his father, white.

Plaintiff is not entitled to an allotment.

Case No. 306.

It is alleged in the complaint in this case that plaintiff is a person of part Indian blood, over the age of

twenty-one years, at present residing in Wahkiakum County, Washington. The defendant in its answer admits that the plaintiff is a person of part Indian blood but denies the other foregoing allegations.

The complaint further alleges that plaintiff has been all of his life recognized as a member of the Quinaielt tribe and has associated and affiliated with the Quinaielt and affiliated and associated bands and tribes of fish-eating Indians of Western Washington living along the Pacific Coast and for the past fourteen years has lived the greater portion of the time upon the Quinaielt Indian Reservation. These allegations are by the defendant denied in its answer.

The complaint alleges that the defendant has recognized other immediate members of the plaintiff's family as Quinaielt Indians and has allotted them upon the Quinaielt Indian Reservation, including his full blood sister, seven nieces and five grandnieces and nephews and that plaintiff has other and more distant relatives allotted upon said reservation; that plaintiff is a widower; that his deceased wife was a recognized member of the Quinaielt Indian tribe and numerous members of her family are recognized members of that tribe and were allotted land upon said reservation. These allegations are by the defendant admitted in its answer.

The plaintiff in this case, an Indian who it is stated [325] was born in 1861, is deaf and for that reason a statement in form an affidavit but unsigned, (Exhibit 14) was admitted as a statement of that to which he would testify. It is as follows:

* * * * * * *

"I am the plaintiff above named; that I am

totally deaf and unable to hear or distinguish sounds; that I can read lips to a slight extent but not in a very reliable way and will be wholly unable to testify excepting in answer to written interrogatories which I can read and write the answers to them.

Affiant says that the annexed statement marked Exhibit A is a list of Indians who are related to me and who have been allotted upon the Quinaielt Indian Reservation. Affiant further says that his mother was Ellen Pellard and she was a full blood Indian woman who was reared and lived all her life at Bay Center, Washington; that she died about 27 years ago, prior to any allotments upon the Quinaielt reservation; that his mother had another child, Adeline Lohre, who died about a year ago and who was allotted upon the Quinaielt reservation, and that said Adeline Lohre had seven children all of whom were allotted on the Quinaielt reservation.

Affiant further says that all his life he has lived in the immediate neighborhood of the Pacific Ocean from the mouth of the Columbia River to the Quinaielt reservation; that all my life I have followed the occupation of a fisherman and still follow it; *thatin* the year 1911 I removed to the Quinaielt reservation at Taholah and lived there for a number of years, making frequent trips to the fishing grounds in Grays Harbor and Bay Center and other places along the Coast and returning to the Quinaielt reservation and fishing in the river there. That I have constantly associated and affiliated with the In-

dians on the Quinaielt reservation and am known to virtually all of them; for some years I was manager of the Quinaielt Indian baseball team composed of Indians on the Quinaielt reservation and as late as the year 1925 was manager of said team, and Robert Sampson, a full blood Quinaielt Indian allotted on the reservation, was the treasurer of this organization.

That some years ago I was engaged in improving the fishing locations along the Quinaielt river driving stakes and piles into the river so that I and the other Quinaielt Indians could string our nets into the river for fishing therein; that this work was gratuitous and I never received any pay for it, that the lumber used was purchased from the Indians and the only funds I received were for the purpose of reimbursing me for the payment for the lumber and the actual expense in connection with the use of the pile driver.

That all my life I have constantly associated and affiliated with the Indians who now live on the Quinaielt river who have come down to Bay Center and the [326] various fisheries along the Pacific Coast and I have associated with them there and have fished with them at these places and also on the Quinaielt reservation. That all of the 48 persons named in Exhibit A hereto attached are blood relatives of mine. That to my knowledge no Indian of the Quinaielt reservation has ever questioned my right as a Quinaielt Indian, and all of them whom I talked with have assured me that I am one of them and entitled to my rights on this reservation.

That I have never received an allotment of

land upon any reservation or upon the public domain. That I have attended such tribal councils as have been held in recent years and have voted at such councils with the full approval and consent of the other Quinaielt Indians.

That I was married to an Indian woman named Tenino Barichio who is now deceased, she was the sister of Frank Barichio who is now living, and is allotted upon the Quinaielt reservation. Her entire family were Quinaielt Indians and allotted upon the Quinaielt reservation. That my father was a Hudsons Bay trapper and voyager who came from Canada in the early days with the Hudsons Bay Company. He was a French Canadian and I think had some Indian blood as most of these French Canadian Hudsons Bay men had.

My sister, Adeline Lohre, a Quinaielt allottee, was married to a Quinaielt Indian who was allotted on the Quinaielt reservation. I had one brother named Henry Peers, now deceased, who was married to Julia Ducheney who died long ago but who was the sister of Agnes Elliott, also allotted on the Quinaielt reservation, as were all of her children.

The small tribe of Indians living on the Quinaielt reservation, those living at Grays Harbor, and those living at Shoalwater Bay, all speaking the same language, are all intermarried and interrelated and when I was a young man growing up in this country they would live part of the time on the Quinaielt reservation, part of the time on Grays Harbor near Westport and part of the time at Shoalwater Bay where Bay Center and

South Bend now are. No distinction was drawn between the various tribes at that time, they were all one people."

The "Exhibit A" mentioned in the affidavit does not appear in the files in this case.

Mr. Bush, mentioned above, testifies that it is his impression that plaintiff's mother was a full blooded Indian born within the Lower Chehalis, married at Chinook where plaintiff was born or taken when young; that his mother moved (from Chinook into Bay Center) thirty-five or forty years ago.

Defendant's witnesses, Billie Mason (Chief Mason) and [327] William Garfield testified that defendant is a Chinook. Upon the trial it is admitted that Mason, Garfield and Samson Johns, leading men of the Quinaielts, would testify that plaintiff was not a Quinaielt and not associated or affiliated with the Quinaielt as a tribe.

It is shown—in fact admitted by the defendant—that plaintiff's mother was an Indian; that his father was a white man and that they were married prior to June 7, 1897; that plaintiff was born in 1861.

It is contended that plaintiff is not entitled to an allotment because neither he nor his mother were ever recognized as members of the Quinaielt tribe; that, as stated, plaintiff's father was a white man; concerning his mother it is defendant's claim that her father was a full blood Chinook and that her mother is variously claimed to have been (a) Full blood Chinook (b) Half Chinook and half Quinaielt (c) Full blood Quinaielt; that the best evidence indicates she was a full blood Chinook.

As in cases number 320 and 321 it is not necessary to determine whether plaintiff's Indian blood was that of a Quinaielt or Chinook or both. His history, manner of life, parentage and association show him to be an Indian of the fish-eating Indians of the Pacific Coast. His life-long association shows his recognition by the members belonging to those tribes at Bay Center and Chinook, if not at Quinaielt. He is entitled to an allotment.

Case No. 307.

Plaintiffs allege that they are persons of part Indian blood, members of the Quinaielt tribe; that they reside in the State of Washington and within this district. The defendant denies that plaintiffs are members of the Quinaielt tribe but admits the other allegations. [328]

Plaintiffs allege that their father was named Henry Peers; that he is now deceased; that he was an Indian and a member of an associated and affiliated band of Indians of the Quinaielt Indian tribe and a fish-eating Indian of the Pacific Coast in Western Washington; that the mother of plaintiffs was named Judith Ducheney; that she died long ago; that she was an Indian and a recognized member of the Quinaielt tribe of Indians. The defendant admits that Henry Peers was the father of the plaintiffs; denies that he was a member of an associated and affiliated band of Indians of the Quinaielt tribe; admits that he was a fish-eating Indian, but denies that he was a member of any tribe entitled to rights on the Quinailt Reservation. The defendant admits that the mother of plaintiffs was Judith Ducheney but denies that she was a member of the Quinaielt tribe of Indians.

Plaintiffs allege that defendant has recognized many members of plaintiffs' family as belonging to the Quinaielt Indian tribe and has allotted many members of such family upon the Quinaielt Indian Reservation—a paternal aunt and seven of her children, a maternal aunt and nine of her children—and that plaintiffs have numerous other relatives allotted upon the Quinaielt Indian Reservation; that the plaintiffs, Amelia Peers Alden and Rose Peers Pickernol, were born, reared, and now live in Pacific County, Washington; and that plaintiff, Mable Peers White, was born and reared in Wahkiakum County, Washington, within this district. The foregoing allegations are denied.

Plaintiffs are nieces of the plaintiff in the preceding case, Archie Pellard, viz: he is their half uncle.

The evidence in these cases is meagre which is probably explained by the fact that counsel concluded that the decision would be controlled by that reached in the related cases, [329] No. 306, 312, 324, 325 and 326.

The decree will be for plaintiffs.

Case No. 315.

In case No. 315 it is alleged by plaintiffs that they are a brother and three sisters; that their fathers were white men; one deceased and one living; that the mother of the plaintiffs is Kate Walkowsky Weiss, an enrolled and allotted Indian of the Quinaielt tribe of Indians; that all of the plaintiffs were born, reared and now live in Pacific County, Washington; that the mother of the plaintiffs has been but recently allotted on the Quinaielt Indian Reservation and expects to make her home upon such reservation when the land

is cleared and a home established; that defendant has not only enrolled and allotted plaintiff's mother but seven of their brothers and sisters and many other members of their family more distantly related.

The defendant admits that plaintiffs are of part Indian blood; admits the enrollment and allotment of the mother, brothers and sisters of plaintiffs. The following facts were also admitted:

"(1) That Kate Walkowsky, the mother of Virginia Walkowsky, Alvin Walkowsky, Catherine Walkowsky and Edna Weiss, minors, was born September 1, 1874; that her Indian name was Toh-toh-atl, and that she is a full blooded Indian.

(2) That Kate Walkowsky was born at Oysterville, Washington, on Shoalwater Bay.

(3) That said Kate Walkowsky on January 9, 1893, married John Walkowsky, a white man.

(4) That the following are the names of the children, and the dates of their birth, which were born to said Kate Walkowsky and John Walkowsky:

a. Albert Walkowsky, born March 31, 1894
b. Louise Walkowsky, born August 1, 1895
c. Frank Walkowsky, born April 9, 1897
d. Ida Walkowsky, born March 3, 1899
e. Grace Walkowsky, Griggs, born June 28, 1900
f. Leonard Walkowsky, born October 26, 1904
g. Rose Walkowsky, born June 16, 1906

h. Kenneth Walkowsky, born January 19, 1909 [330]
i. Virginia Walkowsky, born August 4, 1912
j. Alvin Walkowsky, born May 17, 1914
k. Catherine Walkowsky, born August 26, 1916

(5) That all of the above named children with the exception of Virginia, Alvin and Catherine Walkowsky, have received allotments upon the Quinaielt Reservation.

(7) That the plaintiffs above, Virginia Walkowsky, Alvin Walkowsky and Catherine Walkowsky, were born to the said Kate Walkowsky and John Walkowsky after the adoption of Kate Walkowsky and her eight children by the Quinaielt tribe of Indians. That the said Kate Walkowsky, after the birth of the above named Catherine Walkowsky, separated from the said John Walkowsky and divorced him and married one Robert Weiss, a white man, by whom she had one child, Edna Weiss, one of the plaintiffs above named, born on the 18th day of February, 1919.

(8) That the mother of Kate Walkowsky was an Indian named Spieten who was a member of the Wynooche band of Indians in the State of Washington. That her father was an Indian named Tatl Tohe, and he was a full blooded Chinook Indian."

The Wynooche band of Indians belongs to what has been referred to in the trial as the "Lower Chehalis." (See Handbook of American Indians, Part II, p. 932, "Wenatchi.")

There is no testimony indicating that the status of the mother of the plaintiffs has in any wise changed since her adoption. The children born, as were the three Walkowsky children, after such adoption, would take the tribal status of the mother, without their adoption, unless because these children were born subsequent to the Act of June 7, 1927, they are, because of such enactment, though of a marriage of their parents prior to that date, to be given the status of the father and not the mother's status by adoption, but even if this be conceded they are entitled to allotments for the reason that the Act of June 7, 1897 so provided. The plaintiff, Edna Weiss, was born of a marriage between her mother and a white man which marriage was long after June 7, 1897. The Court of Appeals in the case of Pape v. United States (19 Fed. (2d) 219) at page 220, said: [331]

> " * * * (2) That statute, although it conferred a right upon the children of an Indian woman whose condition brought her within the terms of the act, did not bestow such right upon children of marriages contracted after passage of the act, nor upon the children of a mother not recognized as one of the tribe at the time of her marriage or death. * * * "

The plaintiff Edna Weiss is not entitled to an allotment.

Case No. 314.

It is alleged by the plaintiffs in the complaint that they are persons of part Indian blood and reside in Grays Harbor County, Washington, which allegations are not denied.

It is further alleged in the complaint that plaintiffs have always been recognized as Quinaielt Indians by such Indians; that they belong to the Lower Chehalis branch of the Quinaielt tribe; that they have associated and affiliated with the associated bands and tribes of fish-eating Indians of the Pacific Coast in Western Washington, and have for many years past made their home in immediate proximity to the Quinaielt Indian reservation. The defendant in its answer admits that plaintiffs have made their home in proximity to said reservation but denies the remaining of the foregoing allegations.

It is further alleged in the complaint that the plaintiff, Alvin Smith, is a Quinaielt Indian and the father of the plaintiff, Donald Smith; that the plaintiff Vivian Forden is the daughter of one Juanita Christoffson; that Alvin Smith, Eugene Smith, Juanita Christoffson and Robert Rolfson are the children of Lizzie Rolfson. The defendant, while in its answer denying that any of the plaintiffs are members of the tribe of Quinaielt Indians, admits the other of the foregoing allegations.

Plaintiffs are Lizzie Rolfson, her children and grandchildren. Lizzie Rolfson, born in 1870, is the daughter of [332] a white man and a Chehalis mother. She has been married three times, each of her husbands being white men, and has lived a great part of her life at and near Hoquiam on Grays Harbor. Her residence among and association with these Indians as well as the residence and association of her mother are sufficient to show her membership in the Chehalis tribe of Indians, in view of the fact that it has long had no tribal organization. She was

first married in 1887 at Montesano in Grays Harbor County and divorced ten years later. She was again married at Aberdeen, in Grays Harbor County, in 1902. This husband died in 1903. She was again married in 1907 at Portland, Oregon. Of the first marriage there was born the plaintiff, Eugene Smith, born in 1898 at Seattle and Alvin Smith. Eugene Smith was a soldier in the late war and both reside in San Francisco, where Eugene Smith is working in the post office; Plaintiff Juanita Severson (Christoffson), daughter of the second marriage, born in 1904 at Hoquiam and married at Olympia in 1918; Plaintiff Robert Rolfson, her son of the third marriage, born in 1909 at Newport, Oregon. The plaintiff Donald Smith is a grandson of the plaintiff Lizzie Rolfson, his father being Alvin Smith, who married at Hoquiam. The plaintiff Donald Smith was born at Billings, Montana in 1917, and also lives in California. The plaintiff, Vivian Forden is a granddaughter of the plaintiff Lizzie Rolfson, being a daughter of Juanita Severson, who married Forden, a white man.

The plaintiff, Lizzie Rolfson, is entitled to an allotment. The other plaintiffs, save Eugene Smith, Alvin Smith and Donald Smith, are not entitled to allotments, being children of white fathers, and, if it be conceded the mother should be classified as Indian, the marriages were after [333] June 7, 1897. (Pape v. United States, 19 Fed. (2d) 219); Walkowsky-Weiss, etc., v. United States, No. 315, supra.)

Eugene Smith and Alvin Smith, being children of an Indian woman, by blood and not by adoption, married to a white man prior to the Act of June 7.

1897, are entitled to allotments, not because they are Indians or recognized as Indians of the tribe, but because of the foregoing act. The act provides for such allotment when the mother "is at this time or was at the time of her death, recognized by the tribe."

While the mother, a Chehalis, has not been recognized by the Quinaielt and Quillehute tribes there could have been no further recognition of her by the Chehalis under the circumstances and condition of that tribe, being without tribal organization.

The plaintiff, Donald Smith, is not entitled to allotment because his father is, in all essentials, a white man, living the white man's life. Donald Smith has not been shown to have associated with the Chehalis in any way to imply recognition by them of his membership in that tribe. His situation is in no wise different from that of Mrs. Andrews and Mrs. Bent in the case of Oakes et al. v. United States, 172 Fed. 305, at 306 and 307, except that his Indian blood is through the father and not the mother.

Case No. 309.

It is alleged by plaintiffs in their complaint in this case that they are persons of part Indian blood, which defendant in its answer admits. Defendant denies that plaintiffs are of the Quinaielt or Quillehute or of any of the tribes affiliated with them in the Treaty of 1855-1856. (12 Stat. L. 971.)

Plaintiffs further allege in their complaint that Mary [334] Francis Provoe is an Indian, being a member of an associated and affiliated band of Indians of the Quinaielt tribe and a fish-eating Indian

of the Pacific Coast in Western Washington and is the mother of the remaining plaintiffs; that the father of said children, the husband of Mary Francis Provoe, is David Provoe, an Indian by blood. These allegations are by the defendant denied in its answer.

It is further alleged by the plaintiffs that they were born in Southwestern Washington and have resided in said locality their entire lifetime, all of which time said plaintiffs have continuously lived as Indians, associating and affiliating with the Quinaielt Indians and associated and affiliated bands and tribes of the Quinaielt Indian Reservation; that about the year 1912, in response to a notice sent out by the superintendent of the Quinaielt Indian Reservation, they appeared before the tribal council of said tribe at Taholah, upon said reservation, and were then and there recognized as belonging to and being a part of said Quinaielt tribe of Indians; that plaintiffs have many blood relatives living upon said reservation among whom are Mary Sampson Johns, Lafayette Kindred, Kate Kindred Thomas, Fannie Delamater, Isaac Bastian and Ida Gill. The defendant, for lack of information, knowledge or belief, denies the foregoing allegations.

At the time of trial it was stated that the plaintiff John W. Provoe, had died.

While the denials of the answer are sweeping in their nature and while the testimony in this case is more confusing than in the other cases, the controlling facts are not in doubt.

Defendant's witness, Roblin, the Allotting Agent on the Quinaielt Reservation, testified: (Pages 636-637 of the [335] transcript of testimony)

"A. At the time these applications were made, they were made by David Provoe who was then living, for and on behalf of himself and wife and children and several grandchildren not now in court and I investigated the family history of the applicants and at that time was told and the best information I could get was that David Provoe's mother was a Stikine Indian, that is, from the Stikine district of south Alaska and British Columbia. She had been brought down into this country and had been tribally adopted under the old customs of the Cowlitz tribe and had been amalgamated and become a member of the Cowlitz tribe and David Provoe had been born from a marriage contracted at that time in the Cowlitz country and was always considered and recognized as a Cowlitz Indian. The information given to me at that time as to Mrs. Provoe's family history—Mary Francis—was that she belonged to the Nisqualli tribe and that made the children part Cowlitz by adoption and part Nisqualli. My instructions were to report all the Indians in Western Washington that I found who had any claim against the Government and who were not enrolled at any agency. I reported on about 3000 of those, among them being the Provoe family and I listed them as belonging to the Cowlitz tribe."

Chief Mason, defendant's witness, testified:

"They (plaintiffs) are Cowlitz—I have heard."

On account of the conclusion reached by the court that Chehalis (Upper and Lower) and Cowlitz are

fish-eating Indians of the Pacific Coast within the meaning of the Executive Order of November 4, 1873, affiliated with the Quinaielt and Quillehute tribes in the treaty, under the act of March 4, 1911 it is not necessary, if the court finds plaintiffs to be either Upper Chehalis or Cowlitz, to determine definitely with which of them they should be classed. The Handbook of American Indians, supra, published in 1907, says of the Cowlitz:

> "Cowlitz. A Salish tribe formerly on the river of the same name in s. w. Washington. Once numerous and powerful, they were said by Gibbs in 1853 to be insignificant, numbering with the Upper Chehalis, with whom they were mingled, not more than 165. About 1887 there were 127 on Puyallup res., Wash. They are no longer known by *thisname*, being evidently officially classed as Chehalis." (Page 355, Part I.) [336]

The plaintiff Mary Francis Provoe, the mother of the remaining plaintiffs, is seventy-four years old. The treaty was signed seventy-two years ago. She was married in 1870. The preponderance of evidence shows that she was born in Black Lake, the source of the Black River, a tributary of the Chehalis. The Handbook of American Indians, supra, says of the Chehalis:

> "Chehalis. A collective name for several Salishan tribes on Chehalis r. and its affluents, and on Grays Harbor, Wash. * * *" (Page 241, Part I.)

Black Lake is three miles from Tumwater which

is at the mouth of the Deschutes. There was undisputed testimony in this case that the dividing line between the Nisqualli and the Chehalis was the Deschutes, which flows into the Sound at Tumwater and that Mrs. Provoe (the plaintiff Mary Francis Provoe) and descendants lived on the Chehalis side of the Deschutes. While it was said that she was a Nisqualli the evidence of that fact is far from convincing. It may be that the plaintiff was born within the territory which the Nisqualli relinquished by the Medicine Creek Treaty, as the treaty, respecting the part of the boundary of such territory effecting this matter, says:

> "* * * * to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; * * *" (Kappler, Vol. II, p. 662.)

The court can not take judicial notice of the location of "the coal mine" and there may be a point on the Skookum Chuck Creek, a line from which to some point on the summit of the Black Hills would pass to the west of Tumwater and the mouth of the Deschutes.

Mary Francis Provoe's father was a white man and her mother's father and mother Chehalis Indians of the Black River [337] and Black Lake region. She and the other plaintiffs have, throughout their lives, lived not far from the Chehalis, with the exception of Isabelle R. Rainey, who lived in Canada at one time. The length of her residence there is not shown. It is stated that "they burned out," upon which occur-

rence she evidently returned and has lived since that time in or near the country formerly occupied by the Chehalis.

Mary Francis Provoe's brother and his children have been allotted upon the Quinaielt Indian reservation. Her husband, the father of the other plaintiffs, was born on Cowlitz Prarie. He was adopted by the Cowlitz. There is no evidence as to the date and the court infers that it was before the birth of his children. He was a half blood—half French and half Stikine.

The witness, Pike Benn, whose father told him that he took Governor Stevens down the river (Chehalis) to the treaty ground, testified that Provoe's mother came from Canada. The plaintiff, Mary Francis Provoe, testifies:

"Q. To what tribe or band of Indians did he belong?

A. His mother came from the north.

Q. What do you mean by that?

A. From Stikine.

Q. From Alaska?

A. Yes.

Q. Any other blood than Stikine?

A. No, his father was a Frenchman; he worked for the Hudson Bay people.

Q. Your husband was half Stikine and half French?

A. Yes." (Transcript of testimony, p. 595.)

The greater part of the Stikine River is in British Columbia, but its mouth, Wrangell and Old Wran-

gell, are in Alaska. The Handbook of American Indians, supra, says of Stikine:

> "Stikine. A Tlingit tribe on and near the mouth of the river which bears its name. * * * Their winter town is Katchanaak (Wrangell); their ancient village was Kahltcatlan (Old Wrangell). Shake's Village, Shallyany's Village, and Shustak's Village are also mentioned. * * * [338] (Page 636, Part II.)

The preponderance of evidence, therefore, is that the mother of David Provoe was an Alaska Indian and not a British Columbia Indian but in view of his adoption by the Cowlitz that question would seem to be of little, if any, importance.

The fact that a small reservation was created in 1886 in the former territory of the Chehalis does not effect the questions in issue. This reservation is described in Kappler, Vol. I, p. 901, as follows:

> "Chehalis Reserve (In Puyallup Agency); occupied by Chinook (Tsinuk), Clatsop and Chehalis; area, three-fourths of a square mile."

Official correspondence in 1863 and 1864 relating to the claims of the Chehalis, bearing upon the matter of this reserve, will be found in Kappler, Vol. I, page 901 to 904. The evidence, however, in the present case would indicate that the action of Agent Eels in the decade—1880-1890—rather than the recommendations of 1863 and 1864 brought about the creation of this reserve.

At the council of the Quinaielt Indians held April 4, 5 and 6, 1912, at Taholah, Washington, to consider

applicants for tribal adoption, the first application upon which action was taken was concerning David Provoe and his family and the record of that council proceedings is as follows:

* * * * * * *

1. Case of David Provoe.

The first case was that of David Provoe and his family. The Superintendent explained that this man and his family were admitted into the tribe on an occasion before this, but that the said council was not duly called by the Superintendent as required by the Department. The case was presented in order to give the members a chance to express themselves again in a council duly called by the Superintendent for the purpose of considering applicants for admission into the tribe.

Billy Mason, a member of the tribe, took this occasion to deny certain charges that had been made [339] against. He claimed that some people accused him of taking money for using his influence in getting applicants admitted into the tribe. He asked the Superintendent how all the people present at the council come to be there. He wanted the people to know that there were other members of the tribe to whom they could go besides himself and his father, Captain Mason. He mentioned Billy Garfield, Joe Capeman, Johnson Waukenas, and others. He stated that there was not a person in the house who could say that he ever received any money for helping people in securing admission into the tribe.

The Superintendent explained that some of the people were notified by himself. All who requested to be notified of a council were informed by him. The Superintendent asked Billy Mason what he know of David Provoe.

Billy Mason stated that he was not present at the Council previously held in which David Provoe appeared. He did not know the man and stated that he would leave the matter for the rest of the members of the tribe to decide.

Captain stated that he had heard that there were over 300 Indians coming for land on this reservation. He stated that prior to this time some of the people who were admitted never visited the reservation. They did not come to live on the reservation nor help toward making improvements. He stated that he is not the only one that feels this way. Several other members had expressed themselves in this way. He wants the people who are adopted to come here and help the people at this place. In regard to the application of David Provoe and his family, Captain Mason stated that he knew nothing of them.

David Provoe stated that he was born in the Cowlitz country. His father was a Canadian Frenchman, and his mother, an Indian woman, was from the North near the border on the American side. His wife belongs to the Nisqually tribe of Indians and is related to some allottees on the reservation. Isaac Bastain, he claimed, was a cousin to his wife. He also mentioned Mary Sampson as being a cousin to his

wife. The applicant has no home and wants to make his home on the reservation. He stated his willingness to come on the reservation and help to improve the roads. He stated that he had two horses and would be glad to let them work on the road.

John Smith, a member of the tribe, stated that he knew the applicant, and has known his wife for ten or fifteen years. He also knows the applicant to be a hard working man, and knows that the man will come to live here and help the people. That he was the kind of men the people needed. A man who had teams and wagons to help improve the roads.

Isaac Bastain stated that he knew the man to be a good hard working man, one who will help himself and help other people as well. [340]

Bob Pope, a member of the tribe, says he is an old man now and would like to see some people come in and be neighbors to him.

John Clip, a member of the tribe, says that he knows the applicant. He is a man who will live on his place and improve it. He believes it would be a good thing for the tribe if they would adopt him. He would not do like some other people who get land here but will not come to live on it.

There being no further discussion, the Superintendent presented the following for adoption * * * * * * The vote resulted as follows: 32 for adoption, and 0 for rejection."

The names of the living plaintiffs in the present

suit are placed below in the left hand column and the names of certain of the Provoe family shown by the adoption record of the council to have been voted upon favorably are placed in the column to the right:

Mary Francis Provoe,	Mary Francis Provoe, wife, 57 years
Laura M. Brown,	Laura May Brown, daughter, 30 years
Frank M. Provoe,	Francis Marran Provoe, son, age 40 years
Rosa H. Garrard,	Rose Harriet Garrard, daughter, 25 years
Sarah Spencer,	Sarah Jane Spencer, daughter, 32 years
Isabelle R. Rainey,	Isabelle Rebecca Rainey, daughter, 37 years
William A. Provoe,	William Wallace Provoe, son, 35 years
Raymond A. Provoe,	Raymond Alexander Provoe, son, 22 years

It will be noted that this record shows that David Provoe stated that his wife belonged to the Nisqually tribe. This bald statement is not sufficient to overcome the weight of the circumstantial testimony which has been given concerning her birth and that of her mother and her mother's father and mother and their residence and associations.

Twenty or twenty-five years ago it was written: "The change (from tracing lineage through the female ancestor to tracing it through the male) may be observed taking place in Northwest America peopled

by the Thlinket, Haide and Salish tribes. The first are pure totemists. The last have arrived practically in the South at the modern family while a curious intermediate stage pervades the interjacent region." (Vol. X, Encyclopedia Britannica, Eleventh Edition, page 166.) [341]

The Chehalis are a Salish tribe, "In the South," as here meant. From this point it is significant that the plaintiffs in all cases, and their immediate ancestors, have not taken Indian names but the surname of the father. If the transition described in the foregoing was complete so far as this tribe is concerned at the time in question then Mary Francis Provoe, upon her marriage in 1870, before the Executive Order of 1873, to David Provoe, a Cowlitz, took his status, that is, by her marriage she became a Cowlitz, and their children should be classed as Cowlitz. Whether classed as Upper Chehalis or Cowlitz the plaintiffs named in this suit, other than John W. Provoe, are entitled to allotment.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Nov. 21, 1928.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy [342]

United States District Court, Western District of Washington, Southern Division.

Nos. 312, 299, 300, 301, 302, 306, 307, 309, 314, 315, 320, 321, 324, 325 and 326-E.

SIXTEEN INDIAN ALLOTMENT CASES,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION.

IT IS HEREBY STIPULATED by and between the counsel for the respective parties hereto, that for the purposes of Appeal, one Statement of Evidence shall suffice for the entire Sixteen cases, and one Transcript of Record shall also suffice as a transcript for all the cases on appeal.

It is further stipulated that for the purposes of Appeal herein, all of the above cases that are appealed may be deemed consolidated.

DATED this 19th day of March, 1929.

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for Plaintiffs.

ANTHONY SAVAGE,
United States Attorney.

TOM DEWOLFE,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District

Court, Western District of Washington, Southern Division, March 19, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [345]

In the United States District Court for the Western District of Washington, Southern Division.

HILARY HALBERT, JR., et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

FILINGS—PROCEEDINGS.

Date.			
Month	Day	Year	
Apr.	20	1929	Filed Notice of Lodging Bill of Exceptions in Indian cases No. 299, 300, 301, 302, 306, 307, 309, 312, 314, 315, 320, 321, 324, 325, 326. [348]

COPY OF RECORD FROM U. S. DISTRICT COURT EQUITY JOURNAL, TACOMA.

At a regular session of the United States District Court for the Western District of Washington held on April 30, 1929, at Tacoma in the Southern Division of said District the Honorable Edward E.

Cushman, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

No. 299-E and Consolidated Causes.

HILARY HALBERT, JR., et al.

vs.

UNITED STATES OF AMERICA

ORDER SETTING HEARING DATE FOR SETTLEMENT OF STATEMENT OF EVIDENCE.

On this 30th of April, 1929 the settlement of the Statement of Evidence in Causes No. 299-E etc., (Indian cases) is ordered set for hearing on May 13, 1929. [349]

COPY FROM EQUITY JOURNAL U. S. DISTRICT COURT, TACOMA.

At a regular session of the United States District Court for the Western District of Washington, held on May 13, 1929, at Tacoma in the Southern Division of said District, the Honorable Edward E. Cushman, United States District Judge presiding, among other proceedings had, were the following truly taken and correctly copied from the Equity Journal of said Court as follows:

No. 299-E and Consolidated Causes.

HILARY HALBERT, JR., et al.

vs.

UNITED STATES OF AMERICA

ORDER CONTINUING TIME FOR SETTLEMENT OF STATEMENT OF EVIDENCE.

On this 13th day of May, 1929, this being the time set for the settlement of the Statement of Evidence in the above causes consolidated for the purposes of appeal, it is ordered that this be continued over one week to be heard at Seattle, placed at the foot of the calendar, the proposed Bill and amendments to be sent to the Seattle office. [350]

In the United States District Court for the Western District of Washington, *Northern* Division.

Tacoma cases 299, 300, 301, 302, 306, 307, 309, 312, 314, 315, 320, 321, 324, 325, 326.

HILARY HALBERT, JR., et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

SETTLEMENT OF STATEMENT OF EVIDENCE.

Now on this 20th day of May, 1929, Settlement of

Statement of Evidence is continued to June 20th for Government to file amended statement.

Minute Entry of May 20, 1929. [350A]

In the United States District Court for the Western District of Washington, *Northern* Division.

Tacoma cases 299, 300, 301, 302, 306, 307, 309, 312, 314, 315, 320, 321, 324, 325, 326.

HILARY HALBERT, JR., et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

SETTLEMENT OF STATEMENT OF EVIDENCE.

Now on this 1st day of July, 1929, Settlement of Statement of Evidence is continued one week at Tacoma.

Minute Entry of July 1, 1929. [350B]

United States District Court, Western District of Washington, Southern Division.

No. 299-E, 300-E, 301-E, 302-E, 306-E, 307-E, 309-E, 312-E, 314-E, 315-E, 320-E, 321-E, 324-E, 325-E, 326-E.

HILARY HALBERT, JR., et al,
RICHARD HALBERT,
VERNON SIDNEY HALBERT,
SIDNEY E. HALBERT,
ARCHIE PELLARD,
ROSE PEERS PICKERNOLL, et al,
MARY FRANCIS PROVOE, et al,
LULA M. ELLIOTT, et al,
LIZZIE ROLFSON, et al,
VIRGINIA WALKOWSKY, et al,
MARY BARICHIO PETIT, et al,
DEWEY BARICHIO, et al,
EDNA MAY ELLIOTT, et al,
CHARLES G. ELLIOTT, JR.,
AGNES RUBENS, et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED PROPOSED STATEMENT OF EVIDENCE.

Comes now the above named defendant, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and submits

the following as a true and complete statement of all evidence essential to the decision of the questions presented by the appeal of the defendant and appellant from the decrees entered herein against the defendant, and in favor of the several plaintiffs. [351]

TESTIMONY OF W. B. SAMS FOR ALL THE PLAINTIFFS.

W. B. SAMS, being sworn, testified for all the plaintiffs herein, that he is the Superintendent of the Quinaielt reservation—that he had been superintendent of the Tahola Indian School on the reservation since 1921. That there is no Indian School now but there is a public school, and for six years prior was allotting agent for the United States for the Fall reservation in Idaho, Fort Beck reservation in Montana, and in Idaho; that he was familiar with the methods and rules of allotments on Indian reservations as followed by the Department of the Interior. That the son or daughter of an Indian who is otherwise qualified for an allotment and who has been allotted upon a reservation, is also subject to allotment; but that the son of the second allottee, even though living upon the reservation, and a descendant from the same ancestry, would have to be qualified—be enrolled, before he would be subject to allotment. That the allotment of the father, of a grandfather and a father, does not necessarily exhaust the right of the allotting agent to *allott* to the son. That the headquarters for the Quinaielt agency are located in Hoquiam, about 35 miles from the Quinaielt reservation, and the agency has been located in Hoquiam since about 1922; that he knows the Halberts (certain of the plaintiffs

herein) and that most of them live out of Hoquiam the same place the agency is now located; that most of the Government employes of the Quinaielt reservation live at Hoquiam; that at the present time, to the best of his recollection, a little over 200 Indians are living on the Quinaielt reservation, and that about 1200 approved and pending allotments have been made, and that to the best of his recollection, very few of the allottees live on the reservation; that quite a few of the Indians residing at Bay Center and Willapa Harbor have allotments on the [352] Quinaielt *Riservation.* That he is very familiar with the Quinaielt reservation, its general character, location, etc. That the entrance to and exits from that part of the reservation around Taholah, where most of the Indians live, is accessible only by traveling along the beach a part of the way, which is possibly only during low tide—that other parts have been accessible for a great many years over the highway, but before that they had trails and roads up through the Quinaielt Lake region. That the Quinaielt reservation is heavily timbered and not adaptable to agriculture until the land is cleared—that quite a bit of the timber has been sold by him acting as Superintendent, but though it is admissible, it is not practical for the allottees to live on their allotted land until the timber is taken therefrom—that none of the Indians living on the Quinaielt reservation make *there* living by agriculture but are *fisherman* by trade—they have fishing grounds at Quinaielt River near Tahola, and the Quileute River near Quileute. Have known the Quinaielt for past seven years only; the Bay center Indians fish at the mouth of the Columbia; that in the seven years he has been

there a few of Quinaielt Indians have gone to the Columbia River for the fishing season at the mouth of the Columbia; The Indians from the Columbia come to Quinaielt reservation occasionally to fish. That there are two separate allotment schedules for the Quinaielt reservation—an old one and a new one, and that a few of the Indians residing at Bay Center and vicinity are on the new schedule, and a part of them live off the reservation—that by a guess on his part possibly half the Indians on the new schedule live off the reservation (having in mind a new schedule just completed by himself and Mr. Robling to be sent to the Department). That that part of the reservation where the timber has not yet been sold is accessible on the north but not the south—that the [353] north road was opened last summer, but prior to that was accessible only to a point in the reservation and not through to the Hoh River.

W. B. SAMS TESTIFIED ON CROSS EXAMINATION.

That the agency located in Hoquiam is a general agency for all the different tribes in southwestern Washington, and not the headquarters for the Quinaielt reservation, and tribe alone; that just a few of the Quinaielt Indians fish in the Columbia River, and they fish only to about Chinook and below.

JUDGE WILLIAM E. CAMPBELL'S TESTIMONY FOR PLAINTIFF.

William E. Campbell testified, on being sworn, that he lives at Hoquiam, and has been one of the Judges of the Superior Court at Montesano for three years; that previous to that time he was City Attorney for

Hoquiam and prosecuting Attorney for Gray's Harbor County; that he was born on the Hoquiam River, where the City of Hoquiam now is and is 55 years old; that he has known Mrs. Halbert, grandmother of the Halbert children, all of his life; that he knows she was allotted on the Quinaielt *reservatuon* and that she lived at Hoquiam when she was allotted, and that she died there; that Hoquiam is an Indian name and in early times was an Indian settlement taking its name from the Hoquiam River; That Hoquiam is the same place where the agency is; He is very familiar and well acquainted with the Indians of Southwestern Washington; that he knew and had talked with Sonnie Ford, a white man and uncle of the elder Mrs. Halbert, who was one of the interpreters at the meeting between Governor Stevens and the tribes of Southwestern Washington in Cosmopolis in 1855; that the elder Mrs. Halbert's father was a full-blooded Indian; that he has his knowledge of Indian matters in that district because his (the witness') father, settled in Hoquiam in 1852 and he had, [354] of course, gathered much information as to the historical facts concerning the Indians prior to his own recollection from his family, and that from what he himself knows and has heard of the facts concerning the Indians in that district, the history as related by James G. Swann of the Hoquiam district in his book "The Northwest Coast" is quite authentic; that he does not know of his own knowledge that James G. Swann was present at the meeting in *1885*; but that he had made an exhaustive study of the early history of Grays Harbor and in studying the real history went back to *Swanns* book which was considered an original

source in Indian history and considered the only authentic fact or report of many of the facts existing at that time. That according to what Sonnie Ford had told him the description of the meeting in that book was authentic; that from what he can remember dating back to 1878 and 1879 and from then on, as to the Indians in the Grays Harbor country and at Taholah at that time, he feels sure that the number reported at the meeting were Lower Chehalis, 217; Upper Chehalis, 216; Quinaielts, 158; Chinooks 112; Cowlitz, 140; a total of 843 is correct; that as a boy he knew probably every full grown Indian in the entire Grays Harbor, Quinaielt and Satsop districts, and knows of his own *knowledged* that they intermarried and intermingled a great deal; He knew this *because* his father was justice of the peace and the only postmaster on Grays Harbor, general advisor and Provost Marshal for nearly all of the Indians of that country; That the early allotments when the Shoalwater Bay Indians were allotted on the Quinaielt reservation is well remembered by him and they were so allotted probably for the reason that the Shoalwater Bay and the Quinaielt Indians associated together a great deal and inter-mingled in the picking of oysters at Shoalwater Bay and the trapping and selling of [355] furs on the Columbia River; that he does not know whether the Shoalwater and the Quinaielt Indians spoke the same language but is under the impression the Quinaielts spoke the Chehalis dialect, which is universal on Grays Harbor. He knows the Humptulips—all those living are alloted on the Quinaielt Reservation—that the few remnants of the Wynooche bands used to live on his father's and grandfather's farm and some of

them he knows are allotted on the Quinaielt reservation, that he only knows about the Satsops from hearsay and he thinks all of them are allotted on the Quinaielt reservation; that from his knowledge he believes the classifying of the Humptulip, Wynooche, Satsop, and other smaller tribes under the general term of "Lower Chehalis" (by the handbook of American Indians, Bulletin No. 30 issued by the Smithsonian Institution) is correct; which includes, according to his own knowledge the villages of the Satsop, Wenatichi Whiskah, Humptulip and other small tribes; In this same bulletin under subtitle of "Salishan Family," the Chehalis group embraces six dialects. These are the Quinaielt, the Quaitso of Northwest Washington, the Humptulips on the north part of Grays Harbor, the Lower Chehalis on Grays *Harboad* and Shoalwater Bay, the Satsop east of Grays Harbor, the Upper Chehalis east of Shoalwater *Bat*, and the Cowlitz on the river of that name south of the Columbia River", and he believes this is correct. The Chinooks were first described by Lewis and Clark who estimated their number at 400 but referred only to those living on the Columbia River. Swan placed their number at 112 in 1855, at which time they were mixed with the Chehalis with whom they have since completely fused, their languages now being extinct. That he believes that statement is true, that they have fused with the Chehalis Indians to a certain extent. That he knows many of the Chinook Indians and knows that they intermarried at [356] various times—that Mrs. Pollock is a Chinook Indian, and to a certain extent the Chinooks are fused with the Lower Chehalis Indians; (That he identified

the 'Northwest Coast' by Judge Swann, as being published in 1857, a few years after the meeting at Cosmopolis). That he has known all the Halbert Children since their birth, with the exception of Hilary, who is his own age; that he does not know whether the Indians of his *Distict* went up and down the coast to fish for salmon; that he does know some of them did go oyster picking in season, and to the Columbia River to sell *furts* and that the Halbert family went to the Columbia River to sell furs; that he knows Hilary Halbert, Junior, and that it is mainly a matter of how one looks at it as to whether Hilary Halbert, Junior, would be considered an Indian, but that he, himself, and the pioneers and old settlers who know the history of the families, consider the Halberts as Indians; that he knew the elder Halberts at the time they were allotted—knew their mother and he also knows their children—in fact knows them all. That the mode of living of the Halbert families has not altered a particle since the allotment of their parents —*speadking* of the younger Halbert's mode of living; that as an illustration one of the Halbert boy's name was proposed for membership in a lodge to which the witness belonged and was voted inadmissible by virtue of being an Indian; so far as the little children of the Halbert family are concerned, he supposed they would be considered like any other child—goes by the status of his parent, as a rule; that the Halbert boys are all Indians; that he knows that Fritz, the son of Rich Halbert lived with his father on Quinaielt Lake; that his father and family they lived in a boat house that was floated in the Quinaielt Lake; that Fritz has assisted his father; that the status of the boy has not, to

his knowledge changed in the last twelve to fifteen years; that the Quinaielt Indian agency is located at Hoquiam; that Hoquiam [357] is a trading point of Indians, and for possibly the past fifteen years has always been an attractive place for the Indians to do their trading; that in the early days a great many of them lived there and some of the Indians in the courtroom on that day (date of testimony* were born in Hoquiam and Indians have been coming in and out as long as he can remember; that he knows the Chenois family, having gone to school with the boys; that they were born at Chenois creek; that they were not born on the Quinaielt reservation but about 12 miles from where their Grandmother Halbert was born, and that the Chenoi's are allottees on the Quinaielt reservation; that the Indians of the Quinaielt reservation ship all their fish off the reservation to different places to canneries perhaps, at Aberdeen and Hoquiam; that Halbert used to be more or less interested in buying fish at Hoquiam; that to a considerable extent Hoquiam is the principal trading point; that for the past ten or twelve years Indians have been in and about Hoquiam daily.

JUDGE WILLIAM E. CAMPBELL'S TESTIMONY ON CROSS EXAMINATION.

On cross examination he testified that he knew Lanie Ford Halbert; that he knew her mother and that he saw her away from the Hoquiam River only once; that he cannot remember Lanie Ford Halbert's mother's name; that the Black River, where he saw her, was at the east end of Gray's Harbor county near Oakville, where the Black River tribe lives, possibly

known as the Upper Chehalis tribe; that the distinction between the Upper Chehalis and the Lower Chehalis Indians was probably placed there by the Government; that as regards the intermingling of the various tribes of Indians, these tribes of the Upper Chehalis and Puget Sound, all great possessors of horses, used to come down in large numbers through the Chehalis [358] Valley to attend the potlaches and he does not believe there was any hostility between the tribes; that he does not know whether the Upper and Lower Chehalis tribes entered into the Quinaielt Treaty when it was made at the time of the setting aside of the Quinaielt reservation, for the reason that it was not made at an Indian council; The Chehalis Indians were at the meeting of the Southwestern tribes at Cosmopolis; after the meeting at Cosmopolis, Governor *Stephens* sent some representatives down and had a Treaty signed with these Indians and most of the signers of that Treaty, as furnish by the Government, were Quinaielt and Quileute Indians, and possibly one Grays Harbor Indian; don't know when Lanie Ford Halbert came to Gray's *Habor,* but does know that she lived with his grandmother at Montesano in the 60's. Lanie Ford Halbert is the grandmother of the Halbert boys and girls and she was a girl when she lived with his grandmother in the 60's. Lanie Ford Halbert was married to Mr. Halbert, a white man, in his grandmother's home and they lived with Alex Campbell, his father's brother, who was married to an Indian woman. That he does not know whether Halbert owned a homestead there, but knows that he owned some land. Some of the early settlers paid cash for the land. Some of the Indians took

homesteads the same as white people, filed homesteads under the Indian Homestead law. All the Indians at Oakville did. The Indian title to Gray's Harbor was never extinguished; that rather than have trouble with the Indians some of the white men bargained with them and bought the land from and paid them for it. The Treaty is the only thing that extinguished the claim and as many of the tribes did not sign the treaty it left a cloud on the extinction of the Indian title and is the reason for the passing of the Executive Order of '73. [359]

TESTIMONY OF WM. E. CAMPBELL ON BEHALF OF PLAINTIFF LIZZIE ROLFSON (No. 314-E).

Testifying with regard to Lizzie Rolfson (Plaintiff in No. 314-E), Judge William E. Campbell testified that he has known Mrs. Lizzie Rolfson all his life; that she is about two years older than he is; that she was born and lives in Hoquiam; that she is about half Indian blood and her affiliations with the Indians were that she belonged to those Indians at Hoquiam, Grays Harbor Indians; Virtually the same tribes he named on the Quinaielt reservation; that Lizzie Rolfson's mother was a full-blood Indian; that her father was a white man; that Lizzie Rolfson has four living children, Alvin Smith, Eugene, Juanita and Robert; that two of the boys live in California; that she is about 57 years of age; that Robert lives with his mother in Hoquiam, as well as the daughter and granddaughter; that these children are three-quarter Indian blood of the same tribe as their mother belonged to; That he knew Donald Smith and Vivian

Forden, grandchildren of Lizzie Rolfson, Vivian being the daughter of Mrs. Rolfson's daughter, and Donald being the son of her son Alvin; that Donald lives in California and Vivian in Hoquiam; that they are quarter-breed Indians and are both married to white people; that since she was in school, Lizzie Rolfson has always been considered an Indian and was the daughter of one of the early Indian doctors of the Grays Harbor country.

TESTIMONY OF WM. E. CAMPBELL ON CROSS EXAMINATION AS TO LIZZIE ROLFSON (No. 314-E).

Judge Campbell testified that he based his conclusions that the Rolfson family is considered as Indians on what he knows of their beginning; that he grew up in school with *Lizzei* Rolfson; that Mrs. Rolfson is like all the rest of the Taholah Indians in the court room that day; that the [360] Masons, Halberts, Rolfsons, etc., are all the same; that they do not live differently than the rest of the Indians in the Grays Harbor country; that he doesn't believe he can explain the difference in the mode of living between the white people and the Indians, but that they live like Indians; that Mrs. Rolfson does not live as well as most of the Indians; that he could not state what distinguishes them as Indians except that they live a great deal like Indians; Halbert, for instance, has lived on the reservation, but he (the witness) associates and talks with them, and other white people associate with them as though they were white people; that Hoquiam has always been considered an Indian settlement, but that now very few Indians live there; that it could perhaps be designated an Indian settle-

ment populated with white people. In the 80's the Northwestern Lumber Company's mill was built at the settlement of Hoquiam and the Indians who lived in the three Indian villages there on the Hoquiam River moved in two directions, one going to his grandfather's homestead and they all moved away from the original village except Hoquiam George, whose home after his death was used by the Halbert family spoken of herein; that his father gave the Indians permission to live on his homestead, and were permitted to live on the Carr homestead; probably as high as 50 Indians on his father's homestead; Hoquiam was incorporated in 1889 and there were more white settlers than Indians.

JUDGE CAMPBELL'S TESTIMONY ON RECROSS EXAMINATION

Judge Campbell further testified that Lizzie Rolfson was married three times and each time to a white man and that she lived always in Hoquiam, being away several times for short periods, living in Newport, Oregon for a short time. (It is admitted that Hoquiam is not on the Quinaielt reservation). [361.] That Hoquiam, with the exception of the Indian homesteads, has been on the assessment lists since the county was formed; that hundreds of Indians were at his father's house when Colonel Woods took the census in the *earlu* 80's, but does not know what the census was for, only that the Indians were enrolled; He was the Quinaielt agent and he enrolled the Indians at Hoquiam at that time.

Judge Campbell testified on RE-DIRECT EXAMINATION that Lizzie Rolfson was born on the

Riverdale homestead, now a part of Hoquiam, was the sole heir and sold the homestead, buying property across the river from the original homestead and has always owned that home since selling the original homestead, her father's home.

TESTIMONY OF W. G. PEEBLES, FOR THE PLAINTIFFS.

W. G. Peebles, being sworn, testified for the plaintiffs; that he is a timber cruiser and has lived in Hoquiam about 36 years; that he is familiar with the general character of Hoquiam, as an Indian settlement and with its history.

> On stipulation it is agreed that the witness W. G. Peebles testimony as to the early history of Hoquiam as an Indian settlement would be of the same character as that given by the witness Judge William E. Campbell—with the exception that the Government does not concede that the Indians around Hoquiam are generally considered as being members of the Chehalis group of Indians.

He testified that he knows Rich Halbert, the son of Fred Halbert, very well; that he knows that the Halbert family has lived in Hoquiam since 1888—his first knowledge of them; that he knew their mother and that she was an allottee on the Quinaielt reservation; that he knows the Halberts lived about a mile up the river from Hoquiam city limits, but does not know where the grandmother lived when allotted. [362] That the parents of Sidney, Hilary, Benjamin and Fred lived in Hoquiam, and the boys, with the exception of Fred live in Hoquiam, Fred living at the

Lake; that he knows their families when he sees them; that he regards them as Indians;

W. G. PEEBLES TESTIMONY ON CROSS EXAMINATION.

W. G. Peebles testified further that he does not know whether the Halberts maintained tribal relations but does know that Fred has been on the reservation fishing; that he knows that Rich Halbert (plaintiff) has been on the reservation working with his father; that he does not know their tribal relations; that he knows that Hilary Halbert was on the reservation with boats when they first began using boats on Quinaielt Lake.

W. B. SAMS TESTIMONY ON BEING RECALLED AS A WITNESS FOR THE PLAINTIFFS.

W. B. SAMS, superintendent of the Quinaielt reservation testified that he has charge of the office files —that the office copies of the census rolls are in his keeping—the originals being in Washington; that the Census reports in his office would disclose whether any one was enrolled as an Indian or not in the district; that the "Census of Quinaielt reservation" produced then and there is the office copy of the Agency of the Census report.

(Here the Government admits that the names of Hilary Halbert (Hilary, Junior, Dorothy and Mildred) appear on the census rolls of 1913 to 1918—unallotted, and the name of Rich Halbert appears on the census rolls for the years 1914 to 1918—unallotted). Rich Halbert as Frederick

R. Halbert, Ella Dorothy Halbert the same as Dorothy Halbert.

On cross examination W. B. Sams further testified that he does not know whether the Department of the Interior au- [363] thorized the names of these children being placed on the census rolls; that he does not know how it happens they are named on the census rolls; that he does not know how their names happened to be dropped from the census rolls; that he was not in charge as superintendent when they were dropped; that the superintendents in charge at the reservations were required to keep track of the school children of the Indians whether they attended the school or not and they wrote down a great many childrens names on the rolls to keep track of them; that he believes that it is subsequent to 1912, when they commenced keeping track of the children, a circular having been issued to that effect; that these children were all minors during the period 1913 to 1918 of school age.

W. B. SAMS' TESTIMONY ON REDIRECT EXAMINATION.

That one purpose of the census, as he understood it, was to keep track of the children of the Indians of school age, and the other purpose was to keep a roll of all the Indians; that hundreds of the Indians on the rolls are adults; that Mr. Garber was the agent at the time those census reports were made up, and the witness presumes that Mr. Garber had the same instructions he received with regard to enrollment; that he (Mr. Sams) recommended names for allotment because they were on the census rolls and there was no objection made by the Indians as to the allotments

suggested, but that where the Indians did object he put the matter up to the Indian office for instruction; that he has never recommended an allotment without first taking the matter up with the Indian tribe; that every name suggested by him has been passed on to the tribe with the exception of the minor children of parents enrolled on the reservation. That when he speaks of an Indian being enrolled he means the census roll. [364] That it is the only roll there is of Quinaielt Indians *buth* that the names on the census roll are not all Quinaielt Indians, as track was kept of Indians whether they were Quinaielts or not. For instance, the name of Billy Mason's wife, who is a Yakima Indian, is on the roll with the notation that she is a Yakima allottee; that there is nothing on the census rolls in question to show that the Halberts are not Quinaielt Indians; that he does not know if the elder Halberts are allotted as Quinaielts or not; that he knows that Mr. Fritz Halbert, Senior, has been on the roll but he could not say necessarily that he, Fritz Halbert, Sr., is a Quinaielt Indian; that he (Mr. Sams) never appointed Fritz Halbert, Senior, as a policeman and that he never did serve as an Indian policeman under; He did place permits to be issued to white persons to fish in Quinaielt Lake, in his hands as a matter of convenience and appointed him to issue them, the same as the fish hatchery of the Government had *some*.

W. B. SAMS' TESTIMONY ON RECROSS EXAMINATION.

That there are a large majority of the Indians on the Quinaielt reservation who are not Quinaielt Indians so far as he knows.

TESTIMONY OF FRED P. HALBERT FOR THE PLAINTIFFS. (Cause No. 300-E).

Fred P. Halbert, being sworn, testified that he is the father and duly appointed guardian ad litem of Rich Halbert, a minor, appointed for the purpose of bringing this suit (Cause No. 300-E); that he (the witness) was allotted on the Quinaielt Reservation. [365]

Allotment to witness Fred P. Halbert is admitted by the Government.

Plaintiff's Exhibit No. 1, admitted in *evidende,* said exhibit being the Trust Patent issued to the witness Fred P. Halbert, by the Government for his allotment on the Quinaielt reservation.

He testified that his mother, Lonie Ford Halbert, was allotted on the Quinaielt reservation and received a trust patent, but she died three years ago; that his mother was living in Hoquiam when allotted; that he was living in Hoquiam when he was *alloted;* that his boy Rich (plaintiff) is 19 years of age and was born in Hoquiam; that at the time of testifying he lived with his son Rich at Lake Quinaielt, about 200 feet out of the confines of the Quinaielt reservation where he made his living operating boats and ran an auto park on the lake, and into which business he went at the suggestion of Dr. Keck, the Indian agent; that he and his son lived there during the past year; that prior to that time, or during 1913 *possible,* and 1914 and 1915, they lived at *Yahola* on the Quinaielt reservation; that while at Tahola he made his living by fishing, he having a fishing location in the Quinaielt River which he secured through the Indian

Agent, Mr. Garber, and his boy Rich was with him at that time, and then moved to the Quinaielt Lake section, within the reservation boundary, where he lived for about 10 years; that it was prior to going to Taholah that he lived in Hoquiam, where he was born.

Q. What was the circumstances whereby you left and went up to Lake Quinaielt?

A. I went up to Lake Quinaielt, Dr. Keck, the Agent at that time at Taholah—he asked me if I would not go up to the Lake and put on some boats and take care of the public up there; if I did not, that the Indians stood a chance [366] to lose the Lake and wanted me to put boats on and save the Lake for the Indians; that is for about 10 years he lived in the Lake Quinaielt section, within the reservation boundary, and about a year ago moved to Lake Quinaielt just outside the reservation where he is a boatman and runs an auto park; that he has not applied for a license, but has the permission of the Government to operate these boats on Quinaielt Lake; that white persons have not the right to go on the Quinaielt reservation and operate under these circumstances; that he believes he is recognized by the Government as a Quinaielt Indian because he lives up to the rules of the reservation strictly; that every time rules are passed down there he is notified and *have* to live up to those rules—for instance, having been notified to take his power boat off the lake; that no one but Indians fish in Quinaielt Lake and Quinaielt River, but that he does not so fish; *Commerical* fishing is not allowed on the Lake, and white men cannot fish on it for trout except with a permit issued by him (the witness) as

representative of Mr. Sams, the Agent. That to his knowledge his son (the plaintiff) was enrolled as a Quinaielt Indian, because in 1916 when he was living at Taholah, Mr. Garber, the Indian Agent, asked me *tomcome* in and enroll Rich; that he did not apply for an allotment for Rich at that time and did not ask about allotments, but that Mr. Garber *siad* Rich *wqs* entitled to an allotment, being the reason he wanted to enroll him; that Mr. Garber did not allot or attempt to allot Rich at that time for the reason they were not *than* making allotments; that to his best recollection allotments were resumed two years ago; that then he applied for an allotment for Rich. That he and his brothers went down to the office through Mr. Sams and he made a selection for Rich and Mr. Sams wrote out the description. [367]

Plaintiff's Exhibit No. 2 in Cause no. 300-E admitted, being a typewritten description of the selection.

That Plaintiff's Exhibit No. 2 is a description of his first selection as signed by himself and Mr. Sams, the Agent; that it was prepared by the Agent and he was given one copy. That when he (the witness) was allotted he lived in Hoquiam, then an Indian settlement, there being several Indian villages along the Hoquiam River and the Bay, in the neighborhood from which he and his mother came; that he goes into Hoquiam very frequently and nearly always sees Indians there; that he does not always talk to them; that he knows by sight most of the Indians on the reservation and is on friendly terms with most of them, and some of them come to his place; that he has at-

tended various tribal councils at Taholah of which he was notified, for the purpose of seeing what the Indians were doing—what their routine business was.

TESTIMONY OF FRED P. HALBERT ON CROSS EXAMINATION.

That he has attended four of the Quinaielt tribal councils at Taholah; attended one in 1927; two in 1926 and one when he lived in Taholah thirteen years ago, before the Indians had the regular councils they now have. I judge there were about 100 Indians at each of these councils—they were called by Mr. Sams; that he speaks a little Chinook but the Chinook is not the language the Quinaielts speak generally that they speak the Quinaielt generally, but that he does not speak the Quinaielt language; that his son Rich (plaintiff in No. 300-E) has not attended the tribal council meetings because he had to leave him at home to take care of the place; that he is 19 years old and does not speak the Quinaielt language; that he observes the rules applying to Indians on the reservation insofar as the running of boats is concerned—[368] running boats for hire; that a white man is not allowed to run boats for hire on the lake except that there is one white man who is married to an Indian woman operating boats on the *Quianielt* River; that his son Rich was born in Hoquiam and that Rich's mother (the plaintiff's mother) was a white woman.

TESTIMONY OF FRED P. HALBERT ON REDIRECT EXAMINATION.

On redirect examination Fred P. Halbert testified that the only reason he is operating there is because he

is a Quinaielt Indian and that owing to the ruling of the Indian Department at Washington, D. C., which voted all power boats taken off the Lake, he (the witness) lost the use of his power boat on the lake, because he was living up to the regulations made for the Indians.

(It is admitted here by the Government that the witness—father of the plaintiff Rich Halbert, is part Indian).

TESTIMONY OF FRED P. HALBERT ON RECROSS EXAMINATION.

On recross examination, the witness Fred P. Halbert, testified that his oldest living brother is Hilyer and his oldest brother Kelly, who is dead, would be about 55 years old; that his oldest brother's father was a white man and that his mother's father was a white man and his father (the witness' father) was a white man, and that the mother of his son Rich, was a white woman.

TESTIMONY OF FRED P. HALBERT ON RE-REDIRECT EXAMINATION.

On re-redirect examination Fred P. Halbert *testifie* that for about five years he *wqs* an Indian police at Quinaielt Lake and that none but Indians are allowed in that position; that at the time he was allotted on the Quinaielt [369] reservation he was married to his present wife, a white woman, and was living with her at the time.

TESTIMONY OF BENJAMIN F. HALBERT, PLAINTIFF.

Benjamin F. Halbert, being sworn, testified that he is the father and guardian ad litem of Vernon Sidney Halbert a minor, plaintiff (301-EO; that he is an Indian allotted on the Quinaielt reservation, but does not remember when he was allotted; that the trust patent was issued to him.

(Plaintiff's Exhibit No. 3—Trust Patent above testified to, admitted in evidence).

That his son, Vernon Sidney, is nine years old and was born in Hoquiam and has lived there with him all his life; that he (the witness) was living in Hoquiam when he was allotted within a few blocks of where his child was born; that his son's grandmother was allotted on the Quinaielt reservation, as well as his uncles and aunt, including Fred P., Sidney Seth, Hilary Houghton and Ethan Ernest Halbert and Phoebe Alexander; that he (the witness) attended the Chehalis Indian school for three terms, it being the closest available Indian school to where he lived; There was a public school nearer; that he never lived on the Quinaielt reservation but has been there many times and at the Lake and Taholah; that his sister Phoebe Alexander, who was allotted on the Quinaielt reservation, lived on the reservation at Taholah for about seven years and had a fishing right on the reservation, and he took his family up on occasions and helped her fish; that through his brother Hilary he was instructed by Mr. Sams, that he was to go to the Agency and enroll his son, so he went up to the Agency and enrolled Vernon, his son, about three years ago; that Mr. Sams enrolled

his son, picked out the allotment on the map, wrote a description of it and gave him a copy of it and that the document then [370] shown to him was a copy of the description and the enrollment signed by himself and Mr. Sams.

Plaintiff's Exhibit No. 4 (Cas. No. 301-E) description of land and copy of enrollment—admitted in evidence.

That he (the witness) is one-quarter Indian and that his son Vernon is one-eighth Quinaielt Indian; that he (the witness) has received an allotment on the Quinaielt reservation, but that he has never lived on the allotment; that timber is being removed, but it still has timber on it and he feels that until the timber is removed it would not be possible to live on it.

Plaintiff's exhibit No. 5, being trust Patent issued to Lanie Ford Halbert, admitted in evidence.

That Lanie Ford Halbert was his mother and that she was allotted on the Quinaielt reservation in accordance with the trust patent just admitted in evidence;

Q. Do you go up and visit your brother, Frederick, at the Lake quite frequently—associate and federate with him quite frequently—your child with Rich and the people around the Lake, the Indians who live up there?

A. Yes.

TESTIMONY OF BENJAMIN F. HALBERT ON CROSS EXAMINATION.

That he does not know for certain where his mother, Lanie Ford Halbert, came from—on the Chehalis, but he does not know exactly; that he lives in Hoquiam

and has worked in the sawmill for 25 years; that he has attended tribal councils in Taholah but he does not remember exactly when; that he is recognized as an Indian by the Quinaielt tribe and one of their members; that he does not know whether his son Vernon Sidney, is recognized by any tribe as a member or not; that he does not know whether his son Vernon (born [371] in 1918) has ever associated with the Indians or not, except through him and with him at the reservation; that Vernon Sidney's mother was a white woman.

TESTIMONY OF BENJAMIN F. HALBERT ON REDIRECT EXAMINATION.

That at the time he was allotted and prior thereto he was married to his present wife—a white woman.

TESTIMONY OF HILARY HOUGHTON HALBERT—(Plaintiff in 299-E).

Hilary Houghton Halbert testified that he is the father and guardian ad litem of Dorothy and Hilary Halbert, Jr., and Mildred Halbert; that Ella D is the same as Dorothy Halbert; that all three are living; that he is an Indian and allotted on the Quinaielt reservation; that the document offered him is his trust patent for his allotment on the Quinaielt reservation.

(Plaintiff's exhibit No. 6—Trust Patent admitted in evidence.)

That his three children named as plaintiffs were born in Hoquiam and they are all enrolled on the Quinaielt reservation as Quinaielt Indians; that about three years ago he enrolled them and applied for allotments; that Mr. Sams, the Indian Agent sent him word to come in

and pick out his selections for his children and he and his brothers went in and made selections and Mr. Sams wrote out the descriptions and gave him copies; that Mr. Sams did not question him, just wrote the description of the selections made by (the witness). The document is dated November 30, 1923 and is followed by witness' signature and Mr. Sam's signature.

Plaintiff's Exhibit No. 7, being [372] the document just above referred to and the *desceiption* of allotment selections, is admitted in evidence.

That he and his children have associated and affiliated with the Indians on the Quinaielt reservation and the Indians surrounding Hoquiam; that he considers himself and his children as Indians; that he has always lived where his mother has lived and his children were born and raised in the same community and has never been away from there.

HILARY HOUGHTON HALBERT TESTIFIED ON CROSS EXAMINATION.

That his mother was Lanie Ford Halbert, and that he does not know whether she came from the Chehalis tribe of Indians originally; that he could not swear that it is true that his mother came from the Chehalis River, as his brother testified. That he never heard where she was born. That he received the note from Mr. Sams stating that Hilary Halbert was duly enrolled as a member of the Quinaielts (Plaintiff's Exhibit No. 7).

At this point Plaintiff objected to any attack as to the validity of the patent issued to Mrs. Halbert or her sons as to their status as Quinaielt

Indians for the reason that patents having been issued Government is estopped from denying they are such.

Objection over-ruled. (No exception taken or allowed). . .

That he does not remember whether he ever received a letter from Mr. Sams after that stating that he (Mr. Sams) had no authority to make the said allotment, and that although he would be most likely to remember it if he did.

A. I don't remember whether I ever received any letter from him (Mr. Sams) or not.

Q. Will you say you did or did not? What would be your best recollection?

A. I would say perhaps I did. I would not swear to it. [373]

Q. Do you receive much correspondence from Mr. Sams?

A. No.

Q. You probably would have *remember* it if Mr. Sams had written you a letter stating he had no authority to place your children on the allotment roll?

A. If I got the letter I would have understood it likely.

Q. If you had received such a letter you would have remembered it, wouldn't you?

A. Likely I would.

Q. Will you say you did not or did receive such a letter?

A. I could not say whether I did or did not.

TESTIMONY OF SIDNEY SETH HALBERT (Plaintiff in 302-E).

SIDNEY SETH HALBERT, being sworn, testified that he is the father of Sidney E. *Halbte* (Plaintiff in No. 302-E); that he has been allotted on the reservation—the Quinaielt reservation and is considered an Indian and that a trust patent was issued to him; that the trust patent shown to him then is the one issued to him.

Plaintiff's exhibit No. 8, being trust patent issued to Sidney Seth Halbert, admitted in evidence.

That his son Sidney E. Halbert, was born in May, 1923, in Hoquiam; that he (the witness) has lived in Hoquiam all his life, and lived in Hoquiam when he was allotted on the reservation; that his children were born in Hoquiam; that after Mr. Sams sent him word he and his brothers went down to the Agency and his son, Sidney E. Halbert, was enrolled about November, 1923; that no question was raised then as to this child being an Indian and Agent Sams showed us the map and then made two copies of the selections; Agent Sams signed both copies and he (the witness) signed both copies and one was kept by the Agent and one was kept by the witness. [374] that no question was then raised as to whether any of his boys, nephews or nieces were Indians or not; that Mr. Sams told him then that his children were entitled to allotment on the Quinaieelt reservation.

Government admits that witness got a copy of the selection testified to just above, from Mr. Sams, similar to Plaintiffs Exhibit No. 2.

TESTIMONY OF SIDNEY SETH HALBERT ON CROSS EXAMINATION.

That he does not recall if he got a letter from Mr. Sams dated January 23rd, 1924 (read to the witness) stating "Referring to your desire to file, the Indian office has advised me I have no authority to accept or file such application and I cannot do so until such authority is issued by the Commissioner of Indian Affairs, Sincerely W. B. Sams."

Admitted by Plaintiffs that said letter was received; also admitted that he received a letter from Mr. Sams with the signature torn off, returning to him that part of the selection with the signature torn off.

That he considers himself a Quinaielt Indian. He supposes the Quinaielt Indians so consider him, as he had a little mill where he employed Quinaielt Indians and he goes upon the reservation all the time. He has attended two or three tribal councils at Taholah, one, two years ago, and cannot recall the other years.

TESTIMONY OF W. B. SAMS RECALLED AS WITNESS FOR PLAINTIFFS IN HALBERT CASES.

That it was his duty to keep the census rolls and of the Quinaielt reservation; that he keeps a roll for the Quinaielt Indians and one for outside Indians; that the Halbert children were carried on the rolls until 1919 and then for some unknown reason to him, they were dropped; that on the 1924 roll of Indians kept by him as Superintendent [375] all of the allotted

members of the Halbert family appear, that being the Quinaielt roll.

W. B. SAMS TESTIMONY ON CROSS EXAMINATION.

That all the members who received allotments are on that 1924 roll; that those names got on that roll by the change in the rolls—where the allotments begin about 1906 there were 305 Indians enrolled on the Quinaielt census roll.

W. B. SAMS' TESTIMONY ON REDIRECT EXAMINATION

That all the members were enrolled but he could not say that they were approved by the Department, and that he did not say that patents had been issued to them; that the facts are that at the time the allotments began on the Quinaielt reservation, the Quinaielt census contained the names of 305 Indians, whether entitled to be there or not, but that when the allotments were finished by Mr. Garber he had turned in 690 allotments and 300 additional selections not approved and that he is informed that the superintendent simply took up those allotments and put them all on the census; That Mr. Keller, a clerk in his (the witness') office told him this. Mr. Keller is available, alive, his (witness') clerk, and is in Hoquiam; that the allotment rolls present in court would show the changes themselves. But even with that fact the Halberts were carried on the roll as late as 1924; that they are still being carried; that every allottee is carried on the roll. [376]

W. B. SAMS' TESTIMONY ON CROSS-EXAMINATION.

Testified that this census roll under inspection is the roll of all allotted Indians on the reservation irrespective of whether Quinaielts or not.

W. B. SAMS' TESTIMONY ON REDIRECT EXAMINATION.

That there are Quileutes and Chinooks on the roll; also Lower Chehalis Indians, but not many Upper Chehalis; That many Lower Chehalis and other Indians were allotted by the agent but never enrolled prior to allotment, just simply allotted by him and enrolled afterwards because they were allotted; that some Upper Chehalis, but very few, were allotted and enrolled on the Quinaielt roll, as they were adopted by the tribe at Chehalis; some were not adopted but some were on the Quinaielt roll; that Mrs. Halbert and her children were never adopted and they were on the roll.

W. B. SAMS TESTIFIED ON RECROSS EXAMINATION.

That the fact that an Indian is enrolled on the Quinaielt census roll does not show that he is a member of the Quinaielt tribe.

TESTIMONY OF ALLEN CHENOIS FOR PLAINTIFFS.

Allen Chenois, being sworn, testified that he is a full blood Indian, was born at Hoquiam, or ten miles from Hoquiam, and still lives where he was born; that he has been allotted land on the Quinaielt reser-

vation; that he has always lived near Hoquiam, and about 25 miles off the reservation; that he goes to the reservation each spring during the fishing season and when it is over returns to his home near Hoquiam; that quite a few Indians do that; that he would judge perhaps a third of the Indians leave the reservation after the fishing season is over; that he [377] knows Mrs. Halbert, the mother of Sidney Seth Halbert; that he knows Hilary Houghton Halbert, Fritz or Frederick P. Halbert and Ben Halbert—all four of the Halbert boys; that he has known them all his and their lives; that he will be 54 years old and the oldest Halbert boy is about his age; that he has known the Halbert family all his life and played with the boys as children; that of course there were just a few Indians around then and at that time they considered the Halberts as Indians; that Hoquiam is considered the principal trading point of the Indians; they sell their fish in Hoquiam and buy their tackle and nets there; that he could not say how many Indians live on the Quinaielt reservation proper; that he could not say what proportion of Indians come into Hoquiam from the reservation each month—more than half, *probable;* that he sees them on the streets almost every day in Hoquiam; they come to see Mr. Sams to shop; originally Hoquiam was an Indian village; the Halberts, Indians, and one other, named Lizzie used to be Campbell, lives at Hoquiam; he does not know if there are any others living there.

ALLEN CHENOIS' TESTIMONY ON CROSS EXAMINATION

Allen Chenois testified that as boys they considered the Halbert boys as Indians; that the Halbert boy's children must be Indians now; that he hasn't seen them around so does not know if they live like Indians; that he has not been around the homes of the younger Halberts; has seen the old folks but the young Halberts live in different houses.

TESTIMONY OF CLEVELAND JACKSON FOR THE PLAINTIFFS.

Cleveland Jackson testified that he is a Quinaielt Indian living on the Quinaielt reservation and has been allotted thereon; that his mother is Alice Jackson and she [378] is the daughter of the Chief of the tribe—Taholah's daughter, and that he would be the hereditary chief of the tribe; that he lives at Moclips just across the boundary line of the Quinaielt reservation; that he makes his headquarters and virtually lives in Hoquiam; that he knows Mrs. Halbert and her four sons and their children; that he sees them when in Hoquiam; has been to their homes; that he is about 33 years of age; that Hoquiam is the trading center for the Indians and must be considered an Indian center as the Indian department seemed anxious to move its headquarters there; that probably ninety percent of the buying by the Indians is done between Hoquiam and Aberdeen; the fish are disposed of there and they buy all their provisions, tackle, etc., there; that he is in and out of Hoquiam almost daily and that he has always *seens* Indians there; that with regard to the custom of the

Indians of the Quinaielt reservation fishing in places other than the Quinaielt River, that he knows his father and mother used to go to the Columbia River to fish; that he fished on Gray's Harbor; that he knows where Shoalwater Bay is and is familiar with the fishing locations up and down the Coast; that the Quinaielt Indians went down to the Peacock Pit fishing location and Shoalwater Bay to fish; that the Indians come up to the Quinaielt country and fish, and did in times past; that the Indians from the Quinaielt reservation go down to the Harbor and the Columbia to fish; that that is an old custom; they have always done that; that he considers the Halberts as Indians rather than white.

CLEVELAND JACKSON'S TESTIMONY ON CROSS EXAMINATION.

That he considers the Halbert Indians and considers that they must belong to the Quinaielt tribe because they were allotted there; that he cannot say whether they live as [379] Indians or not since the Government had raised the standard of the living of the Indians considerably for a long time past; that some of the Indians live as a tribe on the Quinaielt reservation; that he would think that the Halbert family would live differently than those Indians who live as a tribe; that he himself is a timber cruiser and does some fishing.

CLEVELAND JACKSON'S TESTIMONY ON REDIRECT EXAMINATION.

Cleveland Jackson testified that he knows Harry Shale (present in courtroom); that Harry Shale is an Indian on the Quinaielt reservation, has the best home

up there and *probalby* as good as fifty percent of the white people; that his living is probably no different than the mode of the Halbert's living; that Billy Garfield a recognized Indian living at Taholah, fishes and runs a hotel for any one who has occasion to stay there; that his mode of living is no different than the Halberts, probably and that he lives the same as white people, just as a lot of the Indians do.

CLEVELAND JACKSON'S TESTIMONY ON RECROSS EXAMINATION.

That basing the standard of living on the method of Indians living in tribes and maintaining tribal relationships, it would be a different matter; that the Indian strain cannot be gotten out of them; they may have a part of their homes fixed up where the white man comes in and feels at home, yet in the back part of the house, they have the old Indian custom; part fixed up like the white people and part like the Indians; that he would not say it was fixed up like the old time Indians, but nevertheless, one would know it was an Indian house. [380]

CLEVELAND JACKSON'S TESTIMONY ON RE-REDIRECT EXAMINATION.

That there has been a gradual change in the mode of living of the Indians since he was a boy; that the Government has encouraged them to give up living in tepees and huts and taught them in school to uplift themselves; to try and live like the white people; that in Taholah there is a public school maintained by the county; that it has been the policy of the teachers to encourage the Indians to learn trades

and live like white people as nearly as possible, and that that has been the policy of the Government ever since he can remember.

TESTIMONY OF ALICE JACKSON FOR THE PLAINTIFF.

ALICE JACKSON, being sworn, testified for the plaintiffs, waiving an interpreter; that she is Alice Jackson and lives at Taholah, on the Quinaielt reservation; is the daughter of Taholah, the Chief; that she has never lived anywhere but at Taholah and the Quinaielt reservation; that she goes into Hoquiam now sometimes, and did years ago to pick berries; goes to Hoquiam sometimes once and twice a week; that nearly all the Taholah Indians go to Hoquiam; that she knows Mrs. Halbert and knew her long before she (Mrs. Halbert) was given her allotment; knew her up on the Hoquiam river; knows her son Hilary; knew all her children when they were small; that Mrs. Halbert is a half-breed Indian; that Mrs. Halbert, if living, would be about her age, 70 years; that quite a while ago she saw one of Mrs. Halberts sons living at Taholah for a while but he moved away; that she does not know where nor when; that she did not keep track; does not know which one; that they called him the Halbert boy; that she knows Mrs. Halbert had one [381] daughter, Mrs. Alexander, who was living on the reservation and had a fishing ground; fished in the Quinaielt river; her name was Phoebe; that she considered Mrs. Halbert an Indian because she was a half-breed; that she thinks Mrs. *Halbertschildren* belong to the Indians; that the Indians not living at old Taholah used to

go to Shoalwater Bay to make money picking oysters, and to the Columbia to fish for the white man; that every summer she and her husband used to go; not many times, and she thinks over thirty years ago; that she went there when she was married; that she could not say they went every summer, but did go back and forth picking oysters; that she does not remember other Indians coming from Shoalwater Bay to fish up around Grays Harbor; she does not know if they did; that no Shoalwater Bay or Bay Center Indians came to the Taholah reservation; that the Bay Center's after they got the allotment, never showed up to live at Taholah; never visited them after they got the allotments and they did not know the half-breeds either; they do not know the half-breed Bay Center Indians; they do not know who of them got allotments; that she never voted to adopt any of them who tried to get in at Taholah except Arthur Strong, Frank Law and Oscar McCloud, but never once for the Bay Centers; that she says this because she is not satisfied with who is coming in without their knowledge; that Mrs. Halbert's children live in Hoquiam; that she does not know what tribe Mrs. Halbert came from; that she does not know her mother; that they used to camp in front of the Halbert place and that is where she learned to know Mrs. Halbert. [382]

MRS. ALICE JACKSON'S TESTIMONY ON CROSS EXAMINATION.

Mrs. Alice Jackson testified on cross examination, that she is not satisfied with half-breeds, considering them as members of her tribe; that she does not know

where Mrs. Halbert's mother came from; that she has just heard about the Chehalis tribe; that she has not seen and does not know the younger Halberts, Rich and Hilary Halbert, Junior, and *Horothy* and Mildred L. Halbert; that she does not know that the Halbert boys ever associated with the Indians; that she is a Quinaielt Indian; knows the oldest Quinaielt Indians; knows all the Halbert boys but not their names; knows Phoebe Halbert from when she lived at Taholah, but not Dorothy; that she associates with the Quinaielt tribe.

MRS. ALICE JACKSON'S TESTIMONY ON REDIRECT EXAMINATION.

Mrs. Jackson testified that her father was a Quinaielt Indian; her mother was half Damon point, she thinks now known as the Gray's Harbor tribes, just across from Hoquiam that she knows the children of the allottees on the reservation from 3 to 19 years, but does not know the children of all the different allottees off the reservation.

TESTIMONY OF PETER HECK FOR THE DEFENDANT.

Peter Heck testified for the Government, that he is an Indian and lives on the Chehalis reservation; that he knew an Indian woman by the name of Sallie —Susan is her right name; that he knew her children; that they are dead; that he knew her girl Lena, whose name was Halbert when she married; that he knows one of Mrs. Halbert's children; that Susan was well known to him; that she was his aunt and lived and died in his house; that she (Susan) was

an Upper Chehalis Indian; that the Upper and Lower Chehalis Indians are separate; friendly sometimes; that this Susan was never adopted into [383] the Quinaielt tribe; that Susan died at his home on the Chehalis reservation; that Susan was the mother of Lena, or Lanie Ford; that he knows one of Lanie Ford's children is named Hill; that he knows Lanie Ford married a man named Halbert; that Susie was a member of the Upper Chehalis tribe of Indians and that Lanie Ford Halbert was a member of the Upper Chehalis tribe through her mother only; that he (the witness) is supposed to be one of the headmen of that tribe; that he received a homestead from the Government on the Chehalis reservation; that he does not consider the children of Lanie Ford Halbert as members of the same tribe of Indians as he.

TESTIMONY OF PETER HECK ON CROSS EXAMINATION.

That the mother of the Halbert boys—of Hilary Halbert—that is Lanie Ford Halbert, was born at Jamestown, just beyond Rochester, on the river side; that when he speaks of upper he means the Chehalis River; that the Upper and Lower Chehalis tribes are two different tribes and speak different languages; that he can understand the Lower Chehalis Indians; that Lanie Ford Halbert was older than he is but he learned from his Aunt Susan, Lanie Ford Halbert's mother, that she (Lanie Ford Halbert) was born at Jamestown on the Chehalis River.

TESTIMONY OF PETER HECK ON RE-DIRECT EXAMINATION.

That the reason he understands the Lower Chehalis Indians is because he speaks the two languages; he can understand the language of the Lower Chehalis, but some words he cannot understand. [384]

TESTIMONY OF SAMPSON JOHNS FOR THE DEFENDANT.

Sampson Johns testified that his name is Sampson Johns; that he is a member of the Quinaielt tribe of Indians.

(An interpreter is asked for and Harry Shale, agreeable to plaintiffs and defense is sworn as interpreter.)

That he lives at Copalis Beach and belongs to the Lower Chehalis Indians; that he knows the mother of the Halbert boys and saw them when they first arrived on the Lower Chehalis; that when he first saw her she was married and had one baby; married to a white man; does not know exactly where they went but he saw them at Cosmopolis heading toward Hoquiam; that she was the grandmother of these plaintiffs, Hilary Halbert, Jr., Dorothy Halbert and Mildred T. Halbert; that he knows that the grandmother of the Halbert children in the court room (plaintiffs) belonged to the Upper Chehalis Indians; that he knows the grandchildren and great grandchildren belong to the Upper Chehalis tribe because they have no blood relationship in the Lower Chehalis. (the names of the six plaintiffs, Hilary, Jr., Dorothy, Mildred, Vernon Sidney, Frederick

Rich and Sidney E. Halbert, having been specifically mentioned in the questioning).

TESTIMONY OF SAMPSON JOHNS ON CROSS EXAMINATION.

That he was born at Lower Grays Harbor near Campbell's Slough; that his father was a lower Gray's Harbor Indian and his mother was a Chinook; that he (the witness) was never adopted into the Quinaielt tribe. That he was allotted on the Quinaielt reservation; that he is married and his wife belongs to Tumwater. [385]

(On stipulation of both parties and agreement it is assumed and conceded that the Lower Chehalis tribal Indians are entitled to allotment on the Quinaielt reservation.)

Sampson Johns further testified that his wife is from Tumwater, near Olympia; that his wife's mother married an Upper Chehalis Indian and remained there; that his wife is allotted on the Quinaielt reservation; that she belongs to the Upper Chehalis tribe of Indians; that he has a homestead and lives on it; that he can understand the Upper Chehalis people when they talk to him in the Indian language, but there is some difference in their language; that in the old days they were divided into two tribes and there was always lots of trouble between them; that his wife was not adopted into the Quinaielt reservation but got in through him (through marriage). In the early days he used to go fishing around Bay Center, Shoalwater Bay and the Columbia River, but that the last time he was over at the Columbia

River was over 20 years ago; that his father's people are all from the Columbia River grounds, his father being a Chinook and having lived at Chinook Beach; that he has one living brother, Johnnie Johns who is also allotted on the Quinaielt reservation; that he was not born on the Quinaielt reservation and does not now live there; that he goes to the Quinaielt reservation quite frequently, as he has his children living there who have their homes on the Quinaielt reservation; that he merely goes to visit; that he has no fishing location at Quinaielt.

TESTIMONY OF SAMPSON JOHNS ON RE-DIRECT EXAMINATION.

That in the early days there were different bands of Chinook Indians, but *now* now; that his father belonged to the band that lived where the McGowan plant is now [386] located; that when an Indian woman married out of her tribe according to the Indian rulings, she loses her rights with her own tribe and gains her rights with the other tribe.

TESTIMONY OF SAMPSON JOHNS ON RE-CROSS EXAMINATION.

That he, (the witness) does not know of any pure-blood Chinook Indians except himself and a few others such as George Charlie and his children; they have died and there is considerable intermarriage between the Chinooks and the Lower Chehalis and Upper Chehalis with the tribes around Grays Harbor.

(Cleveland Jackson here sworn as an interpreter by the Plaintiffs and changes the interpretation of the last question and answer as follows:

That there was considerable intermarriage and mixed up in the most of them all at Taholah. Considerable marriage but most of them lived at Taholah, that the witness does not know his age.

TESTIMONY OF WILLIAM MASON FOR THE DEFENDANT.

WILLIAM MASON testified that his name is William Mason; that he is a member of, and the headman of the Quinaielt tribe; that he knows that Sidney E., Frederick Rich, Vernon Sidney, Mildred T., and Hilary Halbert, and Dorothy Hubble are the children of the Halbert boys; does not know them, but does know the old people; that they are not members of the Quinaielt tribe but are Upper Chehalis Indians; that he does not know if they have been adopted into the Quinaielt tribe.

(Here admitted by Plaintiffs that they have never been adopted into the Quinaielt tribe.)

[387]

That he does not know how they, the Halberts, came to be in; that his father did not tell him; that as the Chief and head of the Quinaielt tribe he does not consider the children of the Halbert boys as members of the Quinaielt tribe.

TESTIMONY OF WILLIAM MASON ON CROSS EXAMINATION.

That he does not know anything about the children of the Halbert boys as he never heard anything about them whether they belong to the Quinaielts or not; that that is what they want to know—how they got

in— his father never let him know and they never adopted them into the Quinaielts.

TESTIMONY OF WILLIAM MASON ON RE-DIRECT EXAMINATION.

That the old people (the Halberts) Fritz and Hilary, and the other fellows "belongs—they got allotments at Quinaielt, that is, Fritz and Hilary and the other fellows, you know; that is all I know and I don't know how they got in." That he (the witness) has an allotment on the Quinaielt reservation but does not know if the Halbert boys got theirs for the same reason he got his.

TESTIMONY OF WILLIAM GARFIELD FOR DEFENDANT.

That he is William Garfield; that he is a member of the Quinaielt tribe; that he does not know Hilary, Jr., Dorothy Halbert Hubble, Mildred, Vernon, Frederick Rich and Sidney E. Halbert; that he only knows Fritz and *Phoeve* Halbert, who lived at Taholah for a while; that he does not know their children and if he has seen them he has never talked to them; that he does not consider them as members of the [388] Quinaielt tribe.

TESTIMONY OF GEORGE CHARLEY FOR THE DEFENDANT.

That his name is George Charley; that he does not live on the Quinaielt reservation, but considers himself a member of that tribe as his mother was a Quinaielt Indian and his father was half Quinaielt; also "because in the nature of the Indians, they belong to the four tribes four different tribes in the

olden times—that is the higher people." That he considers himself to be of the Quinaielt tribe but doesn't live there. That he knew Susie the grandmother of Ernest and Frederick and *Phoeve* Halbert but does not know the younger Halberts (the plaintiffs herein having been named individually) and does not consider them as members of the Quinaielt tribe; that according to the old history of the Indians Susie belongs to the Kwaiailk, now known by the white people as the Upper Chehalis; but there is now no such thing as upper Chehalis; that the name of that tribe originally was Kwaiailk; that in olden times the tribes now known as Upper and Lower Chehalis had a boundary known as Coqualum; that they do not speak the same language; that when an Indian married out of her tribe she simply let go of her original tribe and became part of her husband's tribe, but can be reclaimed by her own tribe and is always welcome to join her original tribe.

TESTIMONY OF GEORGE CHARLEY ON CROSS EXAMINATION.

On cross examination he testified that he lived over at Georgetown on the little reservation there, but has traveled around a great deal; that he has lived on the Columbia River, sometimes at McGowan's, Peacock Pit and [389] Sand Island in the summer time only; that he has lived at Tokeland, Georgetown, a little reservation sometimes called Shoalwater Bay reservation and the place named after him, "Georgetown," since 1862; that all the Indians at Georgetown are allotted on the Quinaielt reservation; that he lived at Georgetown when allotted on the Quinaielt

reservation; that he was born in 1862; that he is familiar with the Indian meeting that was held just previous to the Quinaielt Treaty from his ancestors; that the Indians at the meeting included the Clatsops, Chinooks, Squalmish, Chehalis, (Upper and Lower) Quileutes, Quinaielts, Humptulips, mostly called Chehalis now; that in the olden *ways*, but not originally, he is mostly called Chinook; that his father was born at Chehalis Point called Westport, on Grays Harbor; that his mother was born in Quinaielt; his grandmother, on his mother's side was born at Humptulips; that his grandfather on his father's side was born at Chehalis Point; that he makes a habit of fishing on the Columbia River, the only place he can make a living; that the usual fishing places for the Quinaielts and Chehalis on the Columbia River was Sand Island and McGowans and that the Indians have fished on the Columbia ever since the fishing industry became profitable to the white people and before that in the summer times they went to Shoalwater Bay to pick oysters, but the southern tribes did not go to the Quinaielt to fish; that the movement of the Indians for fishing was from the north down; that his wife is allotted on the Quinaielt reservation; that she lived with him at Georgetown, but they were at Quinaielt temporarily; that they had never made their residence on Quinaielt because he could not make a living there; that the Chehalis Indians don't consider to be fish-eating Indians; they live on fish, but don't consider to be fish-eating Indians; the Chinooks and [390] Indians around Grays Harbor are fish-eating Indians, and the Quinaielts and the tribes around Shoalwater Bay.

TESTIMONY OF GEORGE CHARLEY ON REDIRECT EXAMINATION.

That the Upper Chehalis was originally called Kwaiailk and the dividing line was called Coqualum, above what is now called Elma.

TESTIMONY OF GEORGE CHARLEY ON RECROSS EXAMINATION.

That the Upper and Lower Chehalis names were applied by the white people later on.

TESTIMONY OF GEORGE CHARLEY ON RE-REDIRECT EXAMINATION.

That there is no such name as Upper Chehalis, but they are known now as such by the white people, but they were two different tribes—enemies.

TESTIMONY OF GEORGE CHARLEY ON RE-RECROSS EXAMINATION.

That although the Upper and Lower Chehalis do not speak the same language just a few can understand each other; they cannot understand each other very well.

TESTIMONY OF GEORGE CHARLEY ON QUESTIONING BY THE COURT.

That the Indians above Elma, spoken of as the Upper Chehalis, fished in a different manner from the Indians lower down; that the Indians in Taholah, the Quinaielt, they fish would drift in, and in the Chinook tribe they seined, but this Upper Chehalis they set and used willow traps—didn't use a cord of any kind—they set traps in the summer time; that

the Upper Chehalis Indians had many horses and used horses for transportation and the Lower Chehalis Indians transported by canoe. [391]

TESTIMONY OF W. B. SAMS—RECALLED FOR DEFENDANT.

W. B. SAMS testified that he is Superintendent of the Taholah Indian school. Being shown Plaintiff's Exhibit No. 2 (Description of Selection for allotment) testifies that

"In the fall of 1923 when the case of Thomas Payne versus the United States was decided, and it appearing that allotments would again be made on the reservation, large numbers of people—Indians, part Indians and full bloods and all who believed they had a right on the reservation to allotments—came to the office and wanted to make their selection in view of getting an allotment. That I explained to every one that ever called at that office that it was against the policy of the Indian office to make allotments and I did not know whether allotments would be made any further; also advised them I did not know whether I had the authority to make selections of this kind and that I might be directed by the Commissioner of Indian Affairs to later on dispose of them and I signed with that understanding with everyone that came to that office—some were on the roll—some were not." That he notified each plaintiff in this case later that that particular exhibit was of no effect; that the notice he received from the Indian Department is on file in his office at Hoquiam; that he held tribal meetings with the Quinaielt tribes for the purpose of adopting members of other tribes;

that he served a notice—published a notice of tribal council meeting, and among the names published to be presented to the tribe for adoption was the name of Rich Halbert and he met with the business committee of the tribe before the meeting and asked them to allow him to present his name (Rich Halbert's), but the committee declined to allow Rich Halbert's name to be put up; they [392] declined to allow Rich Halbert's name to be put up; they refused because they did not want him; several others were refused at the same time; that it is not necessary that a man be a member of the Quinaielt tribe to run boats on Quinaielt Lake; that white people are allowed to operate boats there.

TESTIMONY OF W. B. SAMS ON CROSS EXAMINATION.

That there were eight or ten names on the list on which Rich Halbert's name appeared (he has a copy of it) and the tribe passed upon the list and he thinks some of them were adopted; the meeting set then was postponed to a later date; that Plaintiff's Exhibit No. 2 and the various exhibits relative to those selections, is dated November 30th, *19231*, that it was typewritten, probably by some girl in his office who followed one of the forms; that one of the girls in the office prepared the forms for the Indians and they signed them and they were brought to him and he signed them as to the date they filed; that he did not state "duly enrolled," simply that he filed it; that the statement "duly enrolled" was made by the Indian. That on the adoption list he put up only the one Halbert name—that of Rich Halbert; *they* they

had not asked him to put the boys' names on and the name of Rich was put on because his father was at his office and asked him (the witness) to put Rich's name on; the rest made selections, but didn't ask to have their children adopted; that Fritz asked him to put Rich's name on the list and "I wanted them to say he was entitled." That Rich was dropped from the roll in 1919 and that he did not certify in 1923 that Rich was enrolled; that he signed a statement that Rich filed with him on a certain day, and a certain hour. A Quinaielt Indian either has to be recognized by the tribe [393] or adopted, whichever you want to call it, and his suggestion *regard* Rich to his father was that Rich should be adopted; that he told him it was in his (the witness') opinion, the only way he could get an allotment, by being adopted; that he told Rich's father that.

TESTIMONY OF W. B. SAMS ON REDIRECT EXAMINATION

That he also told the rest of them the same thing—that it would be necessary for them to do that to get allotments; that he knew later that they got an attorney at that time or shortly thereafter to proceed in another way than the one he had suggested; that he did not request any of the Halberts, or any one to come in and make selections for allotments; that he did not have to ask anybody; that they came with a rush from all over the country.

TESTIMONY OF CHARLES E. ROBLIN FOR THE DEFENDANT.

Charles E. Roblin testified that he is Special Allotting Agent in the Indian Service of the United

States Government; has been in the Indian Service since August, 1903, and his first work as Allotting Agent was in October, 1907, and in the interval between then and now has been engaged in the allotting work concerning the Quinaielt reservation; that the essentials and pre-requisites to allotments "are prescribed by law and very well defined by interpretations of that law from the Department and from the Court—from the Interior Department, and they vary under different circumstances and under different laws; that there is no departure from the general rule as to their application in the course of departmental procedure as applying at all to the Quinaielt situation; that "what is known as the General [394] Allotment Act is the first Congressional Act of general application specifying the requirements and conditions under which allotments on Indian reservations should be made and the Quinaielt reservation is being allotted under the allotment laws of the United States which includes the General Allotment Act and its amendments. The second section of the Act mentions the Article 6 of the Omaha Treaty. The procedure is there laid down step by step." That it has always been held that to qualify an applicant for allotment of land on the Indian reservation, he must be recognized as a member of the tribe having rights on that reservation, for which that reservation is set aside; that as to the word "recognized" that matter had been variously interpreted and he does not know of any decision or rule that has been laid down that confines the matter strictly to any one set of conditions; conditions vary on the different reservations. Usually, however, it is taken to be required that they

be recognized as a member of the tribal organization; that is, the tribal organization must have recognized the person as a member of that tribe. "In some instances that means to be recognized by the headmen" and in some places general recognition by the tribe, and in other cases a tribal business committee is recognized and action by that business committee is usually taken by the Department as sufficiently advisory to warrant approval. In the case of the Quinaielt, I don't believe that the Department ever specifically ruled that a business committee should have control of tribal membership, it generally being held that the whole tribe should act in general counsel." That where an Indian is born on a reservation, his parents being recognized members of the tribe in their own rights, the child being born in tribal relationship (or, on the reservation) he does not believe any action in the way [395] of any council passing upon the child's title would be necessary. In the case of a child born of Indians on both sides (both mother and father being Indians), but away from tribal surroundings, or off the reservation, it would indicate that at the time of the birth the mother, at least, was not living in tribal relationship at that time and, presumably, that she had abandoned tribal relationship, and if both the mother and the father were living in that condition off the reservation and there was any objection on the part of any of the tribe, no officer of the Government would be warranted in enrolling that child without securing the sanction of the tribe and approval of the Secretary of the Interior.

That the practice as to the keeping of census rolls has varied in the different reservations (he having

worked with census rolls on over 30 reservations); in some jurisdictions the census roll is not taken as the best roll of membership. The official, such as the Allotting Agent, coming on the reservation, will look to other rolls or records rather than the census. That that is particularly true in issues of tribal property made to all the members of the tribe as the distribution of the tribal property. In such cases the occasional payment rolls are the best evidence of tribal membership. In some jurisdictions no such payments are made and the census roll then is frequently taken as the best evidence of tribal membership, but the Department is somewhat in doubt as to the exact weight to put upon the census rolls because the practice does vary so much; that unquestionably in those jurisdictions and at those agencies and in those tribes where annual or other period payments are made, the census rolls would be in better condition, tested out, than in jurisdictions where no payments are [396] because with careful administration these census rolls are revised and *rbought* up to date from any payment rolls prepared during the interval and greater care and caution would have to be exercized in entering a name on such a roll, and due justification made in dropping one from such a roll; that he has never known of a payment of that sort being made on the Quinaielt reservation and the census rolls of the Quinaielt reservation have not been checked up in that manner by period payments; that frequently in many tribes of Indians, tribes have taken into membership those who, if not Indians, were of alien blood and known to be of alien blood and were aken into the tribe because of favor or services, or because of

a liking towards the individual on the part of the tribe, and witness believes that has been done in the case of the Quinaielt tribes.

That after a tribal council has passed upon—either approving of or disapproving of a candidate for membership, the practice being that such action of a tribal council shall be taken at a meeting called by an officer of the Government, the proceedings of the meeting are put in writing, certified to by the official presiding at the council and that record transmitted to the Commissioner of Indian Affairs with a *tecommendation* from the presiding official as to whether or not the action of the council should be approved; that, then, must be passed from the Commissioner of Indian Affairs to the Secretary of the Interior with appropriate recommendations and the approval or disapproval of the Secretary of Interior then becomes final. That the Indian office has prescribed certain set questions and information which must be supplied by the applicant, usually requiring that those questions be answered in writing on forms provided, although it is not necessary; a typewritten form can be prepared substantially [397] complying with those requirements. A further requirement is that the statements of the applicants must be corroborated by those of two or more witnesses, sworn to, and these accompany the report and the proceedings of the council so that the reviewing officer in Washington will have something substantial to work upon. Then, all that having been done, and assuming it is done favorably to the petitioner or applicant, then the applicant becomes, under order of the Secretary, an enrolled member of the tribe, if that is the action of the council.

In some cases the tribal councils take action that a certain applicant shall be considered entitled to a certain proportionate share of the tribal property and that only for instance in an allotment and that they be not adopted into the tribe as a full member and entitled to all the rights, privileges and emoluments of such a member, but if the adoption has been unconditional the course is usually as that outlined; the approval of the Secretary of the Interior will warrant the officials in charge of the tribe to place that person on the tribal roll; that frequently there is a distinction between title to enrollment and title to allotment; the one does not necessarily include the other; in the immediate cases on trial, that that is asked for by the plaintiffs is allotment, not enrollment with the tribes.

TESTIMONY OF CHARLES E. ROBLIN ON CROSS EXAMINATION.

Charles E. Roblin testified that he did not know whether an Indian can sue for enrollment or allotment or not.

Q. Don't you know he does not have to sue for enrollment?

A. I do not. I know not in this case though.

That in his work of allotting on the Quinaielt reser- [398] vation he has had to *resot* to the proper authorities under which allotments were being made on the Quinaielt reservation; that in the *Uniter* States there are three kinds of reservations, designated differently because of the authorities under which created; the "Treaty Reservation," "Executive Order Reservation" and "Congressional Act Reservation."

The "Treaty Reservation" was created in compliance with the Treaty Agreement between the United States and the Indian tribe; the "Executive Order Reservation" is one that has been set aside for the use of a tribe of Indians or for certain Indians in a certain district by the President without complying with any particular Treaty; and a "Congressional Act Reservation" is one specifically set aside by an Act of Congress. The Quinaielt reservation has a dual status. It is a "Treaty Reservation" and also an "Executive Order Reservation." The Treaty of 1855 and of 1856 provided that a tract, or tracts of land, would be set aside for the use of the Indians taking part in that Treaty, and a small reservation was surveyed in 1861 in compliance with that. It was found inadequate for the use of the Indians and the Superintendent of Indian Affairs then in charge of Western Washington, recommended that that be increased in size, which was approved and passed on to the President, and on November 4th, 1873, the present Quinaielt reservation was created by Executive Order, specifically stating that the Executive Order had two objects: First, in compliance with the Treaty of 1855 and 1856 with the Quinaielt Indians in Western Washington; and, second, to provide for other Indians in that locality. Now, as to the Indians taking part in that Treaty, it becomes a Treaty reservation and as to the other Indians in that locality [399] an Executive Order Reservation; the Executive Order set aside a certain tract of land which is the present reservation for the use of the Quinaielt, Quileute, Queets--those are all tribes that took part in the Treaty, and for other tribes of fish-

eating Indians in Western Washington. As to the other tribes of fish-eating Indians of Washington, it is an Executive Order reservation; as to the Quileute, Quinaielts and Queets it is a Treaty reservation. Then, the Act of 1887, the General Allotment Act, was passed authorizing the President to find advantages to the Indians to make allotments on any reservation whether created by Treaty or Executive Order or Act of Congress, and under the authority of that General Allotment Act the Allotment of the Quinaielt reservation was undertaken in 1905 and the first allotment schedule submitted in 1907, containing 119 names; the second allotment schedule was submitted in 1908 containing over 327 names, and the third schedule was submitted in August, 1910, containing some 300 names; that was approved in October, 1910. Due to controversy as to just who and what tribes were entitled to allotments on the Quinaielt reservation, on the existing laws, the Act of March 4, 1911, was passed. Thus, an Executive Order creating the Quinaielt reservation issued on November 4, 1873; a later Executive Order created a small reservation for the use of the Quileute Indians at the mouth of the Quileute of 738 acres on February 19, 1889; another small reservation created for the Hoh Indians at the mouth of the Hoh River on September 11, 1893, about 640 acres; a third small reservation was created for the Osette Indians at Osette Lake, south of the Makah reservation, on April 12, 1893; about 600 acres. The question arose as to whether these Indians for which the small reservations had been thusly created, had thereby [400] forfeited their right, or any rights they might have or have had, to

allotments on the Quinaielt reservation, it being contended that they be required to confine their allotments to the small reservations and to settle that question the Act of March 4, 1911, was passed, which provided that allotments should be made to all Indians of the Quileute, Hoh, Queet, or those Indians who were affiliated with the Quinaielt and Quileute Indians in 1855 and 1856 and who elected to take a reservation on the Quinaielt reservation rather than on the reservation created for the respective tribes; that settled the question so far as Congress could do so; that in his work he has considered that the Act of March 4, 1911, did not confer any rights not previously existing, but that it has confirmed the pre-existing rights to those Indians who were affiliated with the Quinaielt and Quileutes in the Treaty to them and perhaps further define who were affiliated with those Indians at the time of the Treaty; that in 1916 the Indian office assigned him to special work in Western Washington, with instructions to call a council of the Indians of the Quinaielt reservation and consult with them, and the old members of the tribe, the headmen of the tribe, to secure an expression as to their understanding as to what tribes had affiliated with the Quinaielts and Quileutes in making the Treaty. On December 12, 1919, he presided at such council with about 70 or 80 in attendance and quite a number of the old men told their recollection of what had been told them; this was all incorporated in a report to the Secretary of the Interior and eight or ten of the chief men of the tribe signed the statement; they stated the Indians affiliaed with the Quinaielts and Quileute Indians in 1855 and 1856

Treaty were the Hohs, Queets and the Humptulips, and specifically stated that the Chehalis [401] Indians did not affiliate with them in making the treaty. That he understood that Judge Campbell made *thate* statement that one Chehalis or Humptulips Indian named "John" had signed the Treaty; that the only name of "John" on the Treaty (indicating a book taken from the table) was one whom he had been unable to identify as belonging to any particular tribe; the question had been before the Solicitor of the Interior Department and on September 2, 1916, he rendered an opinion which somewhat clarified the situation as to what *trives* or bands of Indians were entitled to allotments on the Quinaielt reservation. On September 2, 1916, the Solicitor for the Interior Department gave an opinion on that question.

TESTIMONY OF CHARLES E. ROBLIN ON REDIRECT EXAMINATION.

That the Act of 1911 is the latest Act having to do with the Quinaielt reservation as far as he knows; that from his best knowledge from a study of the Treaty, etc., the signators to the Treaty of 1855-1856 are the Chiefs, Headmen and delegates of the different bands and tribes of the Quinaielts and Quileute Indians in Western Washington; that in 1855-1856 an Agreement was reached (as previously testified) between representatives of the Government and of the tribes that met at Cosmopolis, but not signed, and later a few men of the tribe went somewhere and signed a paper purported to be a Treaty; that without explanation that does not look so good; that the Chinooks, Cowlitz, Chehalis, Quileutes and Quin-

aielts, Hohs and Queets were all at the meeting at Cosmopolis in 1855, and all associated in preliminary arrangements in making that Treaty; that history shows that the Chinooks, Cowlitz and Chehalis Indians refused to sign [402] that Treaty and that the Treaty as finally drafted and signed was made at Olympia by the men whose names appear in this report of it; but that in Mr. Swan's book published in 1857, two years after the Treaty, on Page 345, an explanation of the failure of the Chinooks, Cowlitz and Chehalis Indians to sign that Treaty is given, being, briefly, that they, the Chinooks, Cowlitz and Chehalis Indians, understood from the Governor that the reservation to be created for all parties would be located in the Quinaielt country, and they did not want to go there, because they were not friends, and if they (a Chinook leader speaking) went north among the other tribes they would fight and soon all be killed," and this same idea was expressed by all and repeated each day of the tribal council. So they tore up the Treaty and refused to sign it. The statement as it appears on page 345 of Swan's report of that Treaty in "The Northwest Coast or Three Years' residence in Washington Territory" was an extract from the speech of one of the Chinook Chiefs and repeated by all.

Speaking with reference to where, if at all, the Pacific Coast ends, he testified that "so far as pertinent it is taken in connection with the expression the "fish-eating tribes of the Pacific Coast" and the Solicitor for the Interior Department on September 2d, 1916, rendered his opinion that it should be confined to the Indians of the immediate Pacific Coast who

are fish-eating Indians, extending from the south side of the Makah reservation to the south of the Columbia River, and intimated that it was confined to such tribes that drew subsistence almost wholly from the water; that his recollection is that the Solicitor stated that it did not include the Chehalis country and a separate reservation was created for the Chehalis Indians; such as George Charley testified about in answer to a question whether he had an allotment on the Chehalis reservation and he stated he had a homestead. The Chehalis reservation was a collection of Indian homesteads contiguous to such an extent that it was afterwards withdrawn and set apart as an Indian reservation, but the inception of the Indian ownership was that of homesteading under the Indian Homesteading Law; that he could not state positively whether anything was included in that reservation that had not been homesteaded, but can state that the Executive Order provided for the purchase of a certain piece of land which was under white ownership and adding that to the tract of land set aside for the Indians; that there was about 400 acres set aside for school maintenance purposes within that reservation, and administrative purposes at the time of the confirmation of the reservation by the Executive Order; that the original of the Treaty signed by ten or so headmen of the Indians is on file in Washington, D. C., but a copy is available at his office—referring especially to the statement from the headmen of the Quinaielt tribe as to who were associated with the Quinaielts and Quileutes in making the Treaty, being incorporated in his report of January 19, 1919.

TESTIMONY OF CHARLES E. ROBLIN ON RE-CROSS EXAMINATION.

That he is as well acquainted with the purposes of the Executive Order enlarging the Quinaielt reservation from 10,000 to 250,000 and 300,000 acres, as possible, from records on hand in the local Indian Agent's and Indian offices, and the office of the Secretary of the Interior; that it was the purpose of the United States Government in the early 50's to make Treaties with all Indians of the United States, and in compliance with that purpose, instructions were issued to the Superintendents of Indian Affairs in charge of the [404] different districts, to make such treaties and in compliance therewith, Governor Stevens traveled all over Washington, Oregon, Idaho, Montana, part of the Dakotas and part of Wyoming and made Treaties with the Indians, his desire being to secure treaties with all Indians in different parts of the country and place them on reservations and in compliance with that plan he desired to have a Treaty made with the Indians of Southwestern Washington, providing a tract of land to be set aside for their use; that Governor Stevens called together the Upper and Lower Chehalis, the Quileutes, Quinaielts, Chinooks, and the Hohs at a great meeting at Cosmopolis; that he does not believe this reservation was especially enlarged by the Executive Order for the purpose of repairing any supposed injury and to help out the Southwestern Washington Indians; that there are approximately 195,000 acres in the Quinaielt reservation as enlarged by the Executive Order, virtually all allottable land, and would allot approximately

2200 Indians, giving each allottee 80 acres; that at the time the Treaty was made he did not believe it was the idea of the Government, nor at the time the Executive Order issued setting aside the reservation as at present constituted and for a period of some years later, perhaps ten to fifteen years, to allot Indians in the present way; that the Treaty provides in its 6th Section that the Government could assign to Indians certain tracts of land for their homes to be occupied under the same provisions and regulations as were provided in the 6th Section of the Treaty with the Omahas passed in 1854, which Omaha Treaty provides that land can be assigned to Indians or heads of families who desire to avail themselves with the privilege and right, and it is essentially a settlement Act as distinguished from an Allotment Act, which requires actual settlement on the land and prescribes that the [405] continuous ownership of the land; that the Allotment Act as at present constituted was not put in shape of legislation until 1901; the whole course of assigning and allotting lands to Indians up to the passage of the General Allotment Act of '87 was a desire to get Indians to live upon the lands, and essentially a Settlement Act. The Act of 1887 provided that residence was not necessary; that he is familiar with the Allotment rolls of the Quinaielt reservations; that there had been some Satsop Indians allotted on the Quinaielt in years gone by, and Humptulips, Chinooks, Bay Center Indians, Lower Chehalis, but he does not know what Upper Chehalis were; that in the case of Mrs. Halbert, she was an Upper Chehalis Indian; that he does not concede that the Government has recognized, in allotting all

those tribes on the Quinaielt reservation, the tribes gathered at the Cosmopolis meeting; nor that they have been allotted without being adopted, with the possible exception of Cowlitz; that a great many of the other tribes were allotted before he came in there without the necessity of being adopted; that the superintendent certified to him the last schedule prepared and forwarded by him to Washington and that that schedule did carry names of members of those various tribes:

Q. In the last schedule you have made up, you have allotted people belonging to all these different tribes and offsprings of those allottees described in the first allotment, have you not?

A. I don't know. It is not within my jurisdiction to decide; that it is in the jurisdiction of the Superintendent who certifies to him and that he (the Superintendent) certified them to him as allotments.

That he has no reason to doubt the testimony of the old Indian just previously given, that he was a Chinook Indian and his wife an Upper Chehalis, but had been allotted [406] on the Quinaielt; and that perhaps a small proportion of those allotted live or have lived on the Quinaielt reservation; that tribal organization is on a much more stable basis now than it ever was prior to 1908; that in the case of a child born to Indians, both the father and mother being full blood Quinaielt Indians with no question as to their nativity and living in tribal relations and affiliation, the regulations issued by the Indian office and approved by the Secretary of the Interior authorizes the superintendent to enroll such a child without question; that there are many tribes of Indians entitled to allotment on the

Quinaielt reservation who are neither Quinaielt Indians nor allotted on the Quinaielt reservation.

In a case similar to the present cases of the Halbert boys, where they have been carried on the rolls for years, to secure an allotment it would be necessary to first go to the Superintendent and ask him to certify them to the Allotting Agent, or else, if he would not do so, take it over the Superintendent's head and go to the Secretary of the Interior direct; but if they exhausted that possibility he presumes they would sue for it; that he does not know of any Humptulips or Wynooches allotted on the Quinaielt reservation; that the Humptulips originally habitated the mouth of the Humptulips River on the north of Grays Harbor and designated more frequently as Grays Harbor Indians than as Lower Chehalis; that he believes that the statement on Page 578 Vol. I of American Ethnology under the head of "Humptulips" reading "meaning 'chilly region' A body of Chehalis on a river of the same name emptying into the Chehalis River, Washington, under the supervision of the Puyallup School Superintendent and Number 21, in 1904" he believes to be true. Also that he believes it to be true that the Satsop Indians are usually [407] classed under the collective term of Lower Chehalis; but that his understanding has been that the small remnant of Wynooche Indians had a larger mixture of Chinook than Chehalis blood; that he thinks the statement in "Handbook of American Indians, Part II, Page 418, under head of "Salishan Family" stating that

> "Chehalis group embracing six dialects, which show considerable variation. These are the Quinaielt and Quaitso of Northwest Washington;

> Humptulips of north part of Grays Harbor; Lower Chehalis of Gray's Harbor and Shoalwater Bay; Satsop east and northeast of Grays Harbor, upper Chehalis east of Shoalwater Bay; and Cowlitz on river of that name southward to Columbia River."

is correct as to all except the Cowlitz, but he does not think they should be included; that it is his understanding that "Chehalis" is the larger term including these different tribes; that in 1910 the United States Government published a book "The North American Indians", being the result of the study of the 1910 census and in one table divided the Indians of the entire North America into certain linguistic stocks and classified the Salishan family as including the Chehalis group, stating the group obtained its name from the dominant tribe, which was "Chehalis" classifying the Quinaielts, Chinooks, Humptulips and Indians around Grays Harbor and Upper Chehalis in that group of *Chechalis* Indians which corresponds with the excerpt taken from the *Handbookd* of American Indians before quoted, with the exception of the Cowlitz;

That possibly half a dozen of the Indians at Quinaielt are living on their allotments; that the Act of 1911 was passed to provide for the same things as was the Executive Order of 1873; they were passed and supposed to *ne* in conformity one with the other, for the purpose of clearing up a controversy as to whether or not the subsequent creating of small reservations for Osette, Quileutes and Hoh [408] tribes, would bar them from exercising their treaty rights under the Treaty of 1855-1856—not for the purpose of one re-

pealing the other; that the Opinion of the Solicitor made in 1916, wherein as he says "that the fish-eating Indians of the Pacific Coast are not intended to include all the tribes or bands, but those Indians of the Pacific to the mouth of the Columbia River" is absolutely in conformity with the recommendation of W. W. Miller, superintendent of Indian affairs in charge of Western Washington in 1865; recommending the creation of a reservation, exactly in conformity with the letter of the Commissioner of Indian Affairs to the President, and in conformity with the Executive Order.

That the names of those placed on the Quinaielt Allotment roll sent to Washington, are gotten from the Superintendent of the Taholah Indian Agency; that he does not feel qualified to state whether Indians other than Quinaielt Indians would be required to receive the recognition of the Quinaielt tribal council on applying for allotment on the Quinaielt reservation, although claiming to be an expert having stated that he understood all the rules and regulations pertaining to enrollment and allotment of Indians, it being out of his jurisdiction and in the jurisdiction of the superintendent, since the question as put to him, with the foundation laid, eliminates him as an expert in procedure, confining it to the exact conditions prevailing at the present time; that he does not recall any particular instructions made by the Department with regard to not allotting timber land on the Quinaielt reservation; that he recalls the case of Tommy Payne, a Quileute Indian; that Tommy Payne applied for an allotment, but does not know if the Superintendent informed Tommy Payne that the Department forbade

the allotment of timber-land; that Tommy Payne sued for allotment and got it and the principal question involved [409] was whether timber-land was allotted; that it is not his (the witness') understanding that it is necessary that Indians other than Quinaielt Indians must apply to the tribal council of the Quinaielt tribe before seeking allotment; that the tribal council called by him in 1919 was not a tribal council of Quinaielt Indians, but a tribal council of the Indians living on the Quinaielt reservation; that in his work he has been most particular to differentiate between the Indians of the Quinaielt tribe and the Indians of the Quinaielt reservation; that his records show that there were 64 adult Indians of the Quinaielt reservation present at that tribal council; that he does not think it would be necessary for members of the Lower and Upper Chehalis, or Chinooks entitled to allotment on the Quinaielt reservation under the Executive Order of 1873 and the Allotment Acts, and regardless of whether or not they are members of a particular band to seek the recognition of the Quinaielt tribe before being allotted; that his previous testimony was not based on the assumption that only members of the Quinaielt tribe have the say about allotment of land on the Quinaielt reservation; that it is not his belief that Indians whose names appear on the Quinaielt census roll for allotment, but who live at Bay Center, or elsewhere, would be required to appear before the Quinaielt tribal council for recognition before being allotted; and the same condition prevailing except that the applicant's name did not appear on the census roll of the Quinaielt Agency, it would be necessary for him to show recognition once existing by the tribe

to which he claimed membership; that is, it would be necessary for him to show he was a member and recognized as such, of [410] some one or several, of the tribes entitled to allotments on the Quinaielt reservation; that he has no documentary evidence showing that the names on the last allotment schedule were submitted to the Quinaielt tribal council for approval by it and does not know if any such exists; that since he has been allotting agent about 746 or 747 names have been submitted for allotment and allotted; that officially he does not know whether any of them were submitted to the Quinaielt tribal council, but personally knows that about 25 to 27 were submitted; that he does not know and has not examined the records sufficiently to state whether or not several hundred Chehalis and Shoalwater Bay Indians living about Grays' Harbor and Shoalwater Bay were allotted on the Quinaielt reservation on approval of the Secretary of the Interior without making application and that trust patents were issued;

Q. Do you not know as a part of the history of that agency that Mr. H. H. Johnson, the Superintendent then in charge of the Agency, was sent down to Gray's Harbor and Shoalwater Bay after these trust patents were issued for the purpose of urging upon these various Indians which belong to four or five different tribes, the advisability of accepting their trust patents on the Quinaielt reservation?

A. I have absolutely no knowledge of such.

That in his testimony with regard to the procedure necessary for an Indian to be enrolled, was with regard to the general rules and regulations applicable to reservations generally; that different situations do

not exist on the Quinaielt reservation by reason of the fact that a considerable number of Indians who might be termed outside Indians, or [411] Indians who live off the reservation, are entitled to, and have been allotted; that the general rules still apply; that certain variances in condition sometimes makes necessary Departmental ruling or interpretation, but the general rules apply to all reservations; that the opinion of the Solicitor talked of yesterday was dealing with a condition prevailing upon the Quinaielt reservation; that conditions similar to the Quinaielt reservation prevail on Fort Berthold reservation in North Dakota where three different tribes are domiciled; Gros Ventre, Mandan and Arikara—there, because of racial differences, they have maintained distinct tribal organizations and their organizations are much more distinct and separate than those on the Quinaielt reservation. On the Yakima reservation in Washington, thirteen different tribes are domiciled and several of those tribes maintain separate and distinct tribal organizations and for matters pertaining particularly to the tribes interested, they have their separate councils and meetings and take actions, but as to matters concerning the reservation in general, the property belonging to all the tribes, they take action at a general council; the Fort Berthold reservation, a Treaty reservation set aside for the three tribes, is almost identical in phraseology with the Executive Order setting aside the Quinaielt reservation for the various tribes entitled on that reservation.

That in the case of the grandmother of the plaintiffs and the father of the plaintiffs, having been allotted on the Quinaielt reservation without being

adopted, that if the applicants—the children of such Indians—declined to have their names submitted to the tribal council or their names were refused on submission to the tribal council, [412] he would suppose they had a right to go to court in the matter;

Q. Is it not your contention that the Indian Department of the *Government can pass rules and regulations for the Government of Superintendent and Allotting Agent*—is it your contention that will, in effect, deprive an Indian who, under the law is entitled to an allotment on the reservation from securing his allotment?

A. Oh, no.

That over a period of 20 years he has worked on some 30 Indian reservations, allotting or assisting in the allotment of land; that many Indians of the 8th blood, and less, have been allotted; that the degree of Indian blood is not the test to the right of allotment; that if the Superintendent of an Agency refuses to certify the name of any Indian whose name is on the Quinaielt Indian reservation census roll and whose father applies for allotment for him, he contends it would be advisable for such a person to submit his name to the tribal council, and that then the approval of the tribal council must be approved by the Secretary of the Interior before allotment can be made; that he knows of no other way of getting an allotment under such circumstances, except by going to court;

Q. You testified, first, the General Statute dealing in allotments, *the Act of '87 known as the Daws Act*—was not this Act by Congress *designed and passed for the express purpose of breaking up tribal life and passed for* the purpose to *give to the Indians their*

lands in severalty so they could become individual citizens and make homes on the [413] *allotments rather than roam in camps and tepees?* Wasn't that the purpose of that Act?

A. If I answer "yes", I am putting that in the minds of the Congress I suppose.

Q. You testified as to all the legislation pertaining to allotments passed pertaining to this reservation. Wasn't that the purpose of that Act? Didn't the Circuit Court of Appeals hold that in the Oakes case?

A. It has been generally understood that is one of the links of the legislation leading to that end.

That it is his contention that an Indian qualified for allotment on the reservation without adoption, can be allotted even if he secretary of the Interior objects to him, even though he be on the Quinaielt census roll in case the Superintendent for any reason refuses to certify his name to the Allotting Agent; that even though the status of an Indian has been fixed by allotment, without adoption, it is still necessary that all of his descendants must be recognized or adopted in turn by the tribe in order to be allotted; that every case stands on its own, and the fact that the parent has been allotted is not conclusive as to the right of the child to be allotted; that is, if a full blood Quinaielt Indian woman and full blooded Indian man had been allotted on the Quinaielt reservation, and they had a son who had been allotted on the Quinaielt reservation, any minor children of that son would still have to be recognized as a member of one of the tribes entitled to rights in the Quinaielt reservation, but not necessarily recognized at a formal meeting of the tribe, or tribal council; that if he were

superintendent [414] of an agency he would exercise the same care in getting up a tribal roll, available for allotment purposes, as he would exercise in getting up a roll that involved the payment of tribal funds.

The Chehalis comprised a bunch of small bands around the lower part of the Chehalis River and also some of the tribes and bands that are around Grays Harbor and the bands that are around the lower part of Grays River about the location of the present town of Aberdeen and Grays Harbor in his designation includes the waters below that point to the mouth of the Grays Harbor where it empties into the ocean. The Upper Chehalis was on the upper reaches of the Chehalis River above Satsop and around the Black River. It is a fact that the Chehalis River which drained the territory occupied by these tribes enters into Grays Harbor, which is a bay entering into the Pacific Ocean.

TESTIMONY OF CHARLES E. ROBLIN ON RE-REDIRECT EXAMINATION

Referring back to previous testimony regarding the 6th Article of the Omaha Treaty characterized as the Settlement Act, Mr. Roblin testified as the development of this settlement act under the present allotment laws as follows:

That the Treaty with the Omaha Indians, made in 1854, was taken somewhat as a form and referred to in subsequent treaties with Indians; this provided that the President might assign to adult Indians, or heads of families, certain lands of the reservations that were to be reserved for the use of Indian tribes with whom the treaties were [415] made, to all those persons who

were willing to avail themselves of the Act and that contemplated that the Indians to whom the assignment was made, should go upon those lands, live upon and till some portion of them, providing assignment should be in varying proportions—one-eighth to adult persons, one-quarter section to heads of families, and further provided that if they did not live upon that land and till a certain portion of it for certain periods, their annuity payments, or any other payments could be stopped, until they returned to those lands and complied with the provisions, and if their absence continued, the assignment could be cancelled entirely and the same land assigned to other persons; that that theory runs through all subsequent legislation up to the Act of 1887, which is known as the General Allotment Acts, and it is illustrated by several special allotment Acts, which provides for assignments of land to the members of the different tribes for which the reservation had been set aside; a typical one being the Allotment Act of 1882, providing for the Crow reservation in Montana, providing that certain assignments might be made in the same areas practically as those provided in the Omaha Treaty. Then on February 8th, 1887, the General Allotment Act was passed providing that it should be allotted in a similar area, that is, to single adult persons, an eighth of a section and to a head of a family, a quarter of a section, and varying areas to Indians of different status, and in 1891 that was amended to provide for allotment to each member of a tribe, the same area, making no distinction between an adult person and a minor, or the head of a family, or with regard to the size of a family; The Act of 1891 [416] provided that each

member of the tribe should receive exactly the same amount of land—and that has been considered the development of the Allotment Laws.

That the reason he called attention to that in previous testimony was to call attention to the fact that in 1873 the idea of allotting lands on Indian reservations in equal amounts to each individual member of the tribe had not been developed—but that since 1887, as amended in 1891, the general procedure in allotment has been to allot to each individual member of the tribe regardless of the status; that under the Treaty in 1855-1856 and the Executive Order of 1873, there was no legislation to indicate that there would be a departure from communal life (speaking of communal life as distinct and different from communal interest in the tribe) affecting the Quinaielt reservation; that the entire course and policy of the Government has been to induce Indians to abandon communal life, and while the 6th Article of the Omaha Treaty provided for assignment of certain lands only for their use, it did state provision would be made handing the privilege of the same land to members of the family on the death of the head of the family; that the restriction on alternation of inherited land was removed February 28, 1892; The first Indian Homestead law was enacted in 1875—which provided it should remain inalienable for five years; an Amendment passed in 1883, provided that the homestead should remain inalienable for 25 instead of 5 years;

Speaking again with regard to the requirements, qualifications for allotment, Mr. Roblin stated; that the Treaties of which several hundred were made in the early 50's, were [417] all made with Indian tribes

and not with individuals; that all legislation in regard to Indian reservations and tribes have specified that the Acts apply to the tribes; that reservations set apart in compliance with treaties and executive orders have all specified having been set aside for the use of tribes of Indians, all emphasizing the idea of tribal property or communal property; from that has developed a general system of legislation designed to protect the interests of the tribes in that tribal or communal property; that as brought out by cross examination, the several subsequent Acts of Congress have provided that persons leaving the tribes for one reason or the other and assuming the habits of civilized life, would not forfeit their rights to the communal or tribal property; that was a provision of both Homestead Acts, of the General Allotment Act and a subsequent Act providing that Indian women marrying white men and assuming the habits of civilized life, would not thereby lose their right to communal or tribal property; still, subsequent legislation in (1907) 1897 provided that the children of an Indian woman so marrying a white man, and that marriage having been solemnized prior to that date, and she, herself, having been once recognized by the tribe, or having been recognized by the tribe as a member of it at the time of her death, or at the time of the passing of the Act, would be entitled to the same rights of communal property as she would have been; those Acts of Congress have encouraged and have been intended to encourage the Indians to leave their tribal life or communal and tribal habits and take up the habits of civilized life, and yet protects them in their tribal or communal rights to the

property of tribes of which they, [418] themselves were recognized as members.

That he knows of no legislation providing that the tribal members resident on the site of the tribal habitat shall in any wise suffer because they do not go into civilized life; that by the first Act providing for citizenship of an Indian by reason of Allotment, was the General Allotment Act of 1887, and that provided that a person born within the limits of the territory of the United States abandoning tribal life and assuming the customs of civilized life became a citizen, but did not thereby lose any rights as a member of the tribe. And the Act of June 4, 1924, provided that all Indians living within the territory of the United States were citizens of the United States but did not by reason of that forfeit their rights of tribal property;

That the Act of February 8th, 1887, in the 6th Section provides generally that an Indian who is a member of a tribe goes away from that tribe, takes up the habits and customs of civilized life, does not by so going away, lose or impair his right in tribal property; that the two Homestead Acts are the only ones the witness' recalls in the way of legislation preserving in an Indian who has so gone away from his tribe, his right by legislation in tribal property; one of the Homestead Acts provided that an Indian abandoning tribal life and making settlement upon land could homestead it; the other specifically extended to Indians of that condition, the rights of the Homestead Act, except no filing fee was required.

That the Act of July 7, 1897, provides that the children of a marriage between a white man and an Indian woman (by blood and not adoption), who was,

if then living, [419] a recognized member of her tribe, and who, if dead before that time (June 8, 1897) was at the time of her death recognized as a member of that tribe,—that such children and so qualified, should be entitled to rights in tribal property—and that that Act is typical of the general languages in legislation emphasizing the necessity for recognition by the tribe as a member of the tribe;

That that Act says that the children of such a woman, and not the grandchildren, are so entitled; that the question of whether "children" included "grandchildren" was taken care of fully in 172 Federal Report, 305, the Oakes case—and was restricted to "children;" that the dominant note in that decision was not that there were grandchildren, but that they were living in a city remote from the reservation and with all the habits of civilized life; that one phrase used in the Oakes case decision, opinion of Judge Vandeventer, was that "If Mrs. Andrews and Mrs. Bend, who were grandchildren in the case, had gone upon the White reservation and established a residence, as was claimed, it would not help them in any case as would be seen later."

With regard to the census rolls prepared in times past used in the Quinaielt reservation or Taholah Agency, the Taholah, or Quinaielt reservation, until 1915, was under jurisdiction of the Cushman School, the Cushman School being located at Tacoma, an Indian community, and Taholah is an Indian community; the site of Cushman was the site of the Puyallup reservation and the Puyallup tribes still own the site of the old Cushman School; Up to January 1, 1915, the Quinaielt reservation was under

[420] the jurisdiction of that superintendency and all the census rolls were prepared at the Cushman school; that includes the census roll up to and including 1914. Then, from 1915 on a superintendency was created having charge of the Quinaielt reservation and the Nisqually reservation, the Chehalis reservation, and all unattached and scattered Indians of southwestern Washington. For administrative purposes the agency was located from 1915 to 1922 or 1923 at Taholah on the Quinaielt reservation; then for similar administrative purposes and in order to bring the agency closer to the center of the location of the Indian tribes and reservations then under the jurisdiction of the Taholah agency, it was moved to Hoquiam, so that up to and including the census of 1914, the census was prepared at Cushman School, Tacoma. From 1915 up to the present time at Taholah Agency, up to 1922 at Taholah and from then on to the present time, at Hoquiam. That he is very familiar with those census rolls having used them a great deal in his work in 1916, 1917 and 1918, and since being allotting agent, has used them on up since 1925; that his jurisdiction is limited to entering what is certified to him as a list of eligibles or ineligibles, which certification comes from the Superintendent.

That with regard to the tribal council meeting called by him in 1918 and 1919, he now has the carbon copy of the report of that meeting with the old Indians which was had to determine what Indians were affiliated or associated with the Quinaielts or Quileutes at the time of the Treaty, in response to the Court's request. [421]

TESTIMONY OF CHAS. E. ROBLIN ON RE-RECROSS EXAMINATION

That he is not familiar with the Act of June 14th, 1852, 12 Stat. L. 427, revised section 2119, dealing with the habits of Indians adopting civilized life.

Defendant's Exhibit A-1, admitted in evidence (no objection being offered by plaintiffs:

Being a copy of a carbon copy of a report made to the Department by Mr. Roblin of the meeting called by him in 1918, of the Indians who could tell what Indians were affiliated or associated with the Quilleutes and Quinaielts at the time of Treaty.

That he did not know to what particular tribes the signers of the report of that meeting just above referred to, belonged—that his call for the meeting was addressed to the Indians of the Quinaielt reservation—not to any particular tribes, but the Indians of the Quinaielt reservation, and that he knows they were all Indians of that reservation, but not to what particular tribe each or any of them belonged, as that was not what they were interested in; that the instructions and from whom the instructions issued, when he was sent out on that errand to get that particular information appears in the paper just offered and admitted in evidence; that so far as he made notes thereof, this exhibit is a copy of what transpired at that meeting;

That prior to 1915 there was no agency at Taholah, but a sort of sub-agency in charge of one of the farmers, and a school-teacher—does not know just when the buildings were built, but when he was in them in 1916 they were new—that the first superin-

tendent was Mr. Garber; that it could not be possible he was the one who enrolled the children of the Halberts, since the rolls show that three [422] of the Halbert children were on the roll of 1913, which was prepared at Cushman School; that the 1914 census roll which was prepared at Cushman School bears a pencil notation containing the name of Frederick Rich Halbert.

TESTIMONY OF CHAS. E. ROBLIN ON RE-RE-REDIRECT EXAMINATION.

That from his own knowledge he does not know how the names of these three children of Hilary Halbert got on the rolls. They were on the rolls before he had anything to do with the census and were dropped from the rolls at a later date, after he had finished his work there.

TESTIMONY OF WILLIAM GARFIELD, RECALLED FOR THE DEFENDANT.

WILLIAM GARFIELD testified that he is a member of the Quinaielt tribe of Indians and that his father belonged to the Quinaielts; that he has seen the Treaty made between the Quinaielt and other tribes of Indians with the Government in 1855, and that his father was one of the signers of that Treaty; that his name was "John"; that his father was the only Indian thereabouts at the time the Treaty was signed that had an English name; that his father was a Quinaielt Indian; that the rest of the Indians had Indian names but his father, and they called him "John"; that he does not now consider Hoquiam an Indian village; that he goes to Hoquiam frequently, but back to the reservation the same day.

TESTIMONY OF WILLIAM GARFIELD ON CROSS EXAMINATION.

That his father's Indian name was John Haytelit; that his father went to San Francisco; that his mother was born in Queets. [423]

TESTIMONY OF WILLIAM GARFIELD ON REDIRECT EXAMINATION.

That he knows what tribes were affiliated with the Quinaielt tribe in the Treaty in 1855, because he was a big boy at that time—the Quileutes, Hohs, Queets and Quinaielts.

TESTIMONY OF WILLIAM GARFIELD ON RECROSS EXAMINATION.

That he does not know how old he is as his father and mother being Indians, they did not count the age; that he goes by the Treaty and when they first opened school in Taholah—that he was the first scholar—he and his sister; that he must be over 70 because he remembers the Treaty—saw the Quileutes, Hohs and Queets come to Taholah; that he cannot say if he is about 80 years old—that the only age he knows is to go by the last Treaty; that he is the only Garfield in Taholah; that he does not know his age and does not know why the census roll says he was born in 1860; that his father and mother don't count age; that he remembers well the Treaty—the last Treaty, but not the Treaty between the Moclips and the Taholahs; that he was not at the meeting at Cosmopolis on the Chehalis River in 1855, but his father was; that he was not at Olympia in 1856 when the Treaty was signed; that he does not know how old he was when

the original Quinaielt Treaty was signed; that he was born and raised on Quinaielt.

TESTIMONY OF WILLIAM GARFIELD ON RE-REDIRECT EXAMINATION.

That he does not consider the Halbert family members of the Quinaielt tribe of Indians. [424]

TESTIMONY OF WILLIAM GARFIELD ON RE-RECROSS EXAMINATION.

That he does not remember if he attended the meeting called by Mr. Roblin in 1918; that John Clip claimed to belong to the Chinooks when he was in Westport because he wanted to get Chinook money; that John Dix belongs to the Queets tribe; that Austin Copalis belongs to the Quinaielts; that he (the witness is a Quinaielt); that Johnnie Johns belongs to the Oiaht tribe; that his (Johnnie Johns') father died right at Oiaht; that Joe Copalis used to live up the river about 10 miles but he belongs to the Quinaielt tribe; that Johnson Waukeenas belongs to the Quinaielts—his father lived about 7 miles up; that Sam Hoh's father was a Queet and his mother a Hoh Indian; that he does not know if there has been a tribal council held on the reservation since 1912 as he does not keep track of anything; that he does not know how many the Indians have taken in the tribe since 1912; that he doesn't know if they still hold councils for the purpose of adopting persons into the tribes; that Mr. Sams is always there when they have that kind of meeting, but he does not think there have been any lately except law suits.

TESTIMONY OF HARRY SHALE, RECALLED AS A WITNESS FOR THE DEFENDANT.

That his name is Harry Shale; that he is a Quinaielt Indian; that he does not consider Hoquiam is now an Indian village; that it is a number of years, not so long as 50 years, since Hoquiam was an Indian village; sometimes in the neighborhood of 30 years since it became a town settled by white people.

That since the Halbert family received its allotments [425] he has considered them members of the Quinaielt tribe; that the members of the Halbert family who have not received allotments are not related by blood so they are not considered as members of the tribe; that they have often wondered how the Halbert family, as to the father who brought suit, got in, or got their allotments on the Quinaielt reservation as none of the tribe knew anything about their relationship to the Quinaielt tribe—until the last few years they found that the Halberts got their allotments through the Alloting Agent Garber, who did not have a right to give away any property on the Quinaielt reservation without the consent of the Quinaielt tribe;

That he does not base his statement on the belief that the Quinaielt reservation belongs to the Quinaielt tribe alone—that there are four tribes mentioned in the Treaty—the Quinaielts, Queets, Hohs and Quileutes, and that no one has any right, except by blood or marriage, and if they be related by marriage they first have to be adopted through a council meeting and the majority of the tribe have to vote on such person before he is admitted as a member of the tribe; that

there were some adoptions a couple of years or so ago, but he does not know how many; that he lives at Taholah and since the road has been built he goes to Hoquiam very frequently—in fact during the fishing season, when they have business there, they go up almost daily and take in their fish from the reservation.

TESTIMONY OF ROSA GARFIELD FOR THE DEFENDANT.

That she is Rosa Garfield, a Quinaielt Indian.

Q. Do you consider Hoquiam an Indian village or settlement?

A. Yes. [426]

Q. Do you understand my question? Do you think that Hoquiam is now an Indian village or Indian city?

A. No.

Q. You don't think so?

A. No.

That she knows the old Mrs. Halbert; but does not know Rich Halbert, or Mrs. Halbert's children; that she does not think they are members of the Quinaielt tribe of Indians; that so far as she knows they belong to the Upper Chehalis.

CLEVELAND JACKSON'S TESTIMONY CALLED IN REBUTTAL FOR THE PLAINTIFFS.

That he is 35 years of age, and knows and is familiar with the Chehalis River which flows into Grays Harbor and has been so long as he can remember; that tide sets up that river to just about the mouth of the Satsop River; in high tide, some above that river.

That he has attended most all of the tribal council meetings held at Taholah; that not many people have presented themselves before this tribal council for recognition or adoption during the past ten years; that the Quinaielts have not passed on more than about a dozen, and the big council of 1912, but the Government employees have passed on a lot more.

CLEVELAND JACKSON'S TESTIMONY ON CROSS EXAMINATION.

That he was speaking of the period since about 1912 up to the present time, and that within that period of about 15 years so far as he knows not over a dozen were passed on by the Quinaielts; that he would say within two or three one way or the other, and that he has attended all [427] the tribal councils put over legally.

W. B. SAMS' TESTIMONY FOR THE PLAINTIFFS IN REBUTTAL.

W. B. Sams testified that he is superintendent of the Quinaielt reservation; that he recognizes the book shown him (noted that it cannot be offered in evidence being required for constant use at the Agency) as being the allotment roll of allotments from 1905 to date; that up to the time Mr. Roblin came there were 690 allotments made, and that now the total number of allotments made is 1414; that perhaps 50 percent of the later allotments are on the Quinaielt reservation—300 of them are Quileutes who live at La Push—leaving probably 500 others, and of that number probably 150 live on the reservation and the others live off—about two-thirds; that a great many of those who live off the reservation appeared before the tribal council

and obtained approval or recognition, in the manner described by Mr. Roblin; not all of them because some of them were duly enrolled parents that are allotted now following their original allotments; that at the last council meeting 50 or 60 outside Indians were adopted into the tribe—that was in 1925 or 1926 and those adoptions were approved by the Secretary of the Interior; that there is a record of them at the Agency, which will be produced later (having been requested by counsel); that would make in the neighborhood of 300 outside people on the census roll being considered; that before allotment began he was instructed by the Indian office to call together some of the headmen of the tribe to go over the roll with them because they had understood [428] a large number of names were on the roll that were probably not there legally, and wherever these headmen objected to the allotment of a person whose name appeared on that roll, that then the matter must be taken up and if possible, get the tribal council to act upon them, or submit the matter to the Indian office for further consideration; these headmen were William Mason, Harry Shale, Johnson, Waukeenas, Jack Mason, Harry Mason—about seven of the number; William Garfield was not there; that Jack and Harry Mason are children of William Mason; that three of these are members of the Mason family; that the two children of William Mason happened to drop in at the meeting; that every name on the roll was gone over and they objected to a great many of the names on the roll; that the instructions, if objection were made by the headmen, was to take the matter up with the tribal council for action on the names of such as were objected to, to see if they would

be recognized as members, and that if evidence of fraud in getting on the roll could be seen, action to be instituted to get them off the roll, and then submit to Washington for approval.

That though the Department did approve of a large number of names on this roll that the Indians did not approve of themselves, the reason given for that was that after the Indians had objected to these names, he called a council meeting and endeavored to get the Indians to consider the names objected to at the council meeting, but the Indians declined to do so, saying "We don't want these people; we won't vote on them" and adjourned the meeting; that then he submitted the whole matter to the Indian Office in Washington, and asked for instructions, and that [429] Department sent back a list of names, 50, 60 or 70 on the list, and told him to certify them because those particular names had been on the roll 10 or 15 years without objections and they had no real grounds to allege they had been put on with fraud, so that on instructions of the Secretary of the Interior he was obliged to certify that list.

That there were about 200 names on the last roll that the Indians had not passed upon favorably; that he (the witness) does not know how those names got on the roll, but does know that the Indians object to them being allotted; that he does not know anything about how the first roll was made up and there is nothing in the offices to show that, nor whether the Indians were consulted about that first roll; that there was a roll of about 305 Indians in use at the time the allotments began and that that

roll was never changed until the allotments were finished in 1913, and that then all the new allottees were entered on the roll because they were allotted.

Here stipulated that the court's requested information as to the distance the tide waters go up the Chehalis River, may be filed at any time during the course of any of the cases involved. [430]

TESTIMONY OF CHARLES E. ROBLIN FOR THE DEFENDANT IN SUR-REBUTTAL.

That he cannot say what proportion of the names submitted to the Department in the last schedule were Quileute Indians—he paid no attention to that, it being out of his jurisdiction.

That the reason for the enlargement of the reservation under the Executive Order of 1873, was because the Treaty provided for the setting apart of a tract or tracts of land for the use of those Indians, and in 1861 W. M. Mill, then Superintendent in charge of the Indians of the Pacific Coast, entered into a contract with the surveyor and had a tract of land containing about 10,000 acres surveyed, which took in the mouth of the Quinaielt River and the Moclips River (the Moclips River has since changed its course and the mouth is not now on the reservation, but then it was); that the reservation extended about five miles back from the Pacific Ocean beach and did not provide sufficient fishing localities, and in 1865 Superintendent Mill recommended to the Indian Department the creation of a larger reservation, defining that proposed enlargement much as the reservation now exists, and stating that the

Quileute and Queets Indians, north of the Quinaielt River, did not reside on the reservation and would not come upon it as at that time constituted; that an enlargement would afford two more fisheries on the Pacific Coast and several more around Quinaielt Lake, the enlargement to take in the mouths of the Queets, Raft and several other smaller rivers emptying into the Pacific Ocean between Queets and Quinaielt Rivers, and east as far inland as Quinaielt Lake; [431]

That no mention was made in this recommendation of desiring the enlargement of the Quinaielt reservation for the purpose of supplying lands to the Indians except in the manner above outlined; that the enlargement comprised rough land and presented no inducements to white settlers, but the main purpose of the enlargement was to supply fishing reservations at the Queets and Raft Rivers, and on the lake; that letter to the Commissioner was written in 1873.

Plaintiff's Exhibit No. 9, being photostatic copy of the Solicitor General's opinion, admitted in evidence.

Upon that letter of recommendation for enlargement and setting aside of the reservation written by the Commissioner of Indian Affairs in 1873, the Executive Order of November 4th, 1873, was issued, and practically repeated the recommendations of Superintendent Mill (Miller).

That the letter of Superintendent did not have reference to making allotments; he recommended that the Indians be gathered together, but no mention was made of allotments. [432]

It is here stipulated for the purpose of taking care of the selection matter, in Cause No. 300-E—(Rich Halbert), that Paragraph 6 be amended as follows, in place of the Tract as supplied in the complaint:

East half of N E quarter Sec 9 TP 23, N. of R. 11 W. W. M. by reason of the fact that the plaintiff has made this last named selection in place of the tract supplied in the complaint.

On request of counsel for the plaintiff, objected to by the Government, the Court allows the plaintiff to withhold the argument in the Halbert cases, Nos. 299-E; 300-E; 301-E and 302-E, until the completion of all the testimony, having been consolidated for trial, but to be argued separately. [433]

In re: LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, JUANITA CHRISTORFSON, ROBERT ROLFSON, DONALD SMITH and VIVIAN FORDEN, Minors, by LIZZIE ROLFSON, as Guardian ad Litem; cause No. 314-E.

Mr. SPAULDING.—It is agreed too that the testimony of Mason and of Garfield and of Mrs. Garfield will be the same in this case as to the tribal relationship of this pliantiff as it was in the Halbert cases.

Mr. ROWLAND.—We will agree to that.

The COURT.—There is nothing stipulated now.

Mr. SPAULDING.—The only reason we are doing that is so these Indians living below Hoquiam can get started for home before dork.

Mr. ROWLAND.—We will agree their testi-

mony with reference to Lizzie Rolfson will be the same as testified to concerning the Halbert children. We will agree to that.

Mr. ELLIOTT.—We won't stipulate this woman is a upper Chehalis.

Mr. ROWLAND—In regard to the status of Hoquiam and tribal affiliation—

Mr. SPAULDING: (Interrupting)—The principal thing we are interested in is that she is not recognized as a member of the Quinaielt tribe of Indians.

Mr. ROWLAND.—In other words, in their judgment, she is not recognized as a member of the Quinaielt tribe of Indians. We will stipulate they will testify that.

The COURT.—Mason, Garfield and Mrs. Garfield?

Mr. SPAULDING.—Yes, Your Honor.

The COURT.—Proceed. [434]

TESTIMONY OF LIZZIE ROLFSON FOR THE PLAINTIFF.

LIZZIE ROLFSON testified that she lives at Hoquiam, and has always lived there since her birth at Hoquiam; that she is supposed to be an Indian and supposed to belong to the Lower Chehalis tribe; that she is a half-blood; that her mother was a full-blood Indian of the Lower Chehalis tribe; that she was married three times, the first time to William Smith, a white man, in February, 1887, in Montesano, and that she has two living children by Mr. Smith, Alvin and Eugene—they are plaintiffs in this case; that Alvin was born in Hoquiam and

lived there until he was grown, then going to Montana for his wife's health, and finally to California for his son's health; That Alvin is one of the plaintiffs in this case; that Eugene was born in Hoquiam and lived there until he went to war; that now he is working in the post office in San Francisco, and has been in San Francisco since he got out of the army, except for one year at his home in Hoquiam.

That her second husband was Lewis Sievertson, who is dead; that he was a white man and she married him in 1903; that she has one daughter living, by him—Juanita Christorfson, who was born and is still living in Hoquiam; that Juanita's daughter, Vivian Forden, was also born in Hoquiam; that Juanita is a quarter-blood Indian and is married to a white man—that Vivian Forden, her child, is eighth-blood.

That her (Lizzie Rolfson's) third husband, was a white man, Charles Rolfson, whom she married in 1907; that she has one child, Robert Rolfson, by this man, and he is a plaintiff in this case; that he was born at [435] Newport, Oregon; that she (Lizzie Rolfson) lived in Hoquiam 11 years but has always maintained a home there her entire lifetime; that she was 6 years old when her mother died and her father died when she was 9; that then she made her home with Lanie Ford Halbert, the mother of the Halbert boys, and was raised by her.

That Donald Smith is her grandson, about 9 years old; that his mother died and she raised him in Hoquiam from the time he was about 1 until he was 7, when he was taken to California.

That her son Charles Rolfson was born in Newport, Oregon, they having gone down there to improve some land her husband, Charles Rolfson, owned there, to get it ready to sell. She intended to return to Hoquiam, and did so return, and has lived there the past eleven years.

TESTIMONY OF LIZZIE ROLFSON ON CROSS EXAMINATION.

Lizzie Rolfson testified on cross examination, for the purpose of placing the exact places of birth of some of the plaintiffs herein; that Donald Smith, her grandson, was born October 2, 1917, at Billings, Montana; that Alvin Smith, her son, was born at Hoaquiam, April 30th, 1888; that Robert Rolfson, her son, was born at Newport, Oregon, February 24th, 1909; that Juanita was born at Hoquiam, February 17th, 1904, and Eugene Smith was born May 24th, 1898, at Seattle, all being plaintiffs herein.

That she belongs to the Lower Chehalis tribe; that she associated with them up to the time she went to work; that she is now 57 years old; that she [436] associated with the Halberts all her life; that she just grew up with the town and the Indians have all left; that she has visited, since she was 13, at Quinaielt, with Mrs. Alexander who lives, and has visited among them, sometimes for a week at a time; that the Chehalis never had any tribal meetings that she remembers; that as a girl when living on the Bend she attended some of the Indian meetings; that her mother's name was Myotta, Mattie in English; that her mother had one brother and that he belonged to the Chehalis right there

where she lived; that she had a cousin, Jack Oya, but does not know what tribe he belongs to as he left Hoquiam, and she has not kept track of him;

That she put her name in for enrollment on the Quinaielt with Garber; that she was not taken in, having put it down that she was in the Chehalis tribe and they would not let her in; that she made application for the other members of her family (the plaintiffs herein) but they were rejected—would not let them in because they were Chehalis; that her mother was born in Hoquiam.

TESTIMONY OF LIZZIE ROLFSON ON RE-REDIRECT EXAMINATION

That she went down to be enrolled, or to put in application for claims, and Mr. Sams read to her from the roll that she belonged to the Chehalis tribe and could not get in.

TESTIMONY OF LIZZIE ROLFSON ON RECROSS EXAMINATION.

That she does not remember just when that was that she made application, but in 1918; that she first went to Mr. Sams and then to Mr. Roblin; that it was Mr. Garber [437] she went to at Taholah and that after the allotment advertisement in the paper she went to Mr. Sams and he told her she could not get in, but she could not say exactly how many years ago.

TESTIMONY OF PHOEBE ALEXANDER FOR THE PLAINTIFF—314-E.

That she is an Indian, allotted on the Quinaielt reservation at Taholah; that she knows Lizzie Rolf-

son, and that Lizzie Rolfson is a half-breed Indian; that Lizzie Rolfson lives in Hoquiam, and has lived there ever since she (the witness) has known her; that she is 43 years old and has known Lizzie Rolfson all her life; that she (the witness) was born in Hoquiam, and lived on the Quinaielt reservation for about 7 years from 1913; that she had a fishing location there; that she left the Quinaielt reservation because she understood they were not going to lease them any more lower ground; that her fishing location was right near the mouth of the Quinaielt River; that Dr. Hill, the agent down there, told her that no more lower grounds would be leased and that she then gave up her location and went back to Hoquiam;

That she has known Alvin and Eugene Smith ever since they were babies; also, she has known Juanita Rolfson Christorfson since she was a baby, and they were all born in Hoquiam; that she has known Robert Rolfson, Lizzie Rolfson's youngest son, ever since he was a baby; that he has lived in Hoquiam practically all his life;

That her (the witness') Mother, was a half-breed Quinaielt Indian and the first time she saw Lizzie Rolfson was in her own mother's home; that she regards the Rolfsons [438] as Indians; that she sees many Indians in Hoquiam whenever she goes downtown; that the Indian agency is located there; that she knows all the Indians, and talks with them, that live on the Quinaielt reservation; that she sees many of the Indians living at Taholah in Hoquiam when they come in to trade their fish.

TESTIMONY OF PHOEBE ALEXANDER ON CROSS EXAMINATION.

That her name before she was married was Phoebe Halbert.

TESTIMONY OF PHOEBE ALEXANDER ON REDIRECT EXAMINATION.

That her name is Phoebe Halbert Alexander, and that she is a sister of the Halbert boy's father (plaintiffs in cases herein).[439]

TESTIMONY OF W. B. SAMS FOR DEFENDANT—314-E.

W. B. SAMS testified that he knows of Jack Oya, and knows John Oya, the son of Jack Oya, very well; that Jack Oya is allotted on the Chehalis reservation, more in the nature of a homestead, but that the son John is not allotted;

That Lizzie Rolfson never appeared before him and the Quinaielt tribe of Indians to ask for adoption, and so far as he knows, her children have not either.

> At this point, on agreement of counsel for parties hereto, it is agreed that all cases being consolidated, the swearing of a witness in one case is considered as taking the oath in all cases.

TESTIMONY OF CHARLES E. ROBLIN FOR DEFENDANT.

CHARLES E. ROBLIN testified that he is at the present time qualified, being the Alloting Agent on the Quinaielt reservation; that he knows Lizzie Rolfson; that in 1916 to 1919 he was working in

Western Washington as Special Indian Agent, not Special Allotting Agent, and at that time Mrs. Lizzie Rolfson appeared before him and applied for enrollment, indefinitely, but what she wanted was an allotment for herself and her children on the Quinaielt reservation,-making an affidavit before him of her family history, residence, marriages, children, dates of birth and places of birth, signing the affidavit as prepared by him for her; that when she testified that she appeared before Mr. Garber he believes she might be mistaken, thinking it was him, but that she appeared before him (Mr. Roblin). [440]

That her name was presented before the Quinaielt tribe for adoption and the tribe refused to adopt her, and the Secretary of the Interior, upon his recommendation, denied her adoption; that he does not believe the name of Robert Rolfson was included in that, as he was then born; that this affidavit and application is on record in the form of a certified copy of the originals from the Indian office; that the council meeting at which the application was presented extended through three days, December 18th, 19th and 20th, but the exact date this application was considered is not fixed;

That if one has the other requirements, then Lower Chehalis Indians are entitled to allotment, but the contention of the Department is that the "other requirements" are that they be recognized members of the Chehalis tribe of Indians and if they are, then they are not barred from allotment; that the document handed him is a photostatic certified copy

of an affidavit prepared by him for and signed by Lizzie Rolfson on November 21st, 1918.

Defendant's Exhibit A-2, photostatic copy of affidavit last above mentioned, admitted in evidence.

It is here STIPULATED by and between the respective parties that the testimony of all the Indians offered by the Government, as to the number of Indians, the Indian population of Hoquiam will be the same as given in the Halbert cases. [441]

TESTIMONY OF CHARLES E. ROBLIN ON CROSS EXAMINATION.

CHARLES E. ROBLIN testified further that he prepared the affidavit (Defendant's Exhibit A-2) from information given him by her; that she read the affidavit after written by him and before signing it; that he is not certain that he specifically informed Mrs. Rolfson at that time that since she was an Indian of half-blood, of the Chehalis tribe, it would be necessary for her to be adopted by the Quinaielt Indians, but that was the object she had in coming to see him;

Q. That was the natural information you would have given her? You would have suggested to her she would have to be adopted in the Quinaielt tribe?

A. Yes.

That at that time it was, and now is the theory of the Government, that any person belonging to the Chehalis tribe must be adopted by the Quinaielt tribe in order to be allotted; that his instructions were at that time to assist those desiring that end; that Lizzie

Rolfson's affidavit is dated on the 21st of November, 1918, and the tribal council was held, as called by him, for the purpose of presenting applications, on December 18th, 19th and 20th, 1918; that defendant's Exhibit No. 2 is a report of the proceedings of that council—that is, a small portion of it, the whole proceedings containing several pages; that those who signed that particular part of the report were simply recognized Indians of the Quinaielt reservation; not headmen; that she did not appear before the people named in the report; that the council was held for three major purposes; (first) to obtain information from the older Indians of the reservation as to what tribes [442] were associated with the Quinaielts and Quileutes in the Treaty; (second) to obtain further information for the Department as to applications which had been presented before a preceding council held in April, 1912; (third) to present to the council, applications for enrollment from new applicants; and any other business that might be required. At the request of the Court a certified copy of that part of the minutes of that meeting was prepared which dealt only with the first object for which it was called; that is, to obtain from older members of the tribes, information as to who were associated with the Quinaielts and Quilleutes in the Treaty; the balance of the report was not copied, and he hasn't it before him; that the Indians named in that portion of the report on exhibit are the 64 adult members of the Indians of the Quinaeilt reservation called in to obtain that particular information, and those who signed that report did so to signify that it was a correct report of the meeting; there was no particular

significance attached to the particular names signed to the report—the other 54 were not present when the six signed the report.

That with regard to the Lower Chehalis Indians, there are a large number of bands of the Lower Chehalis who have not, so far as known, kept up any tribal organization or tribal meetings for considerable time; that he does not know how Lizzie Rolfson could particularly show that she was a recognized member of the Lower Chehalis if they have no organization—that the majority of those bands have been incorporated in the Indians of the Quinaielt reservation, distinguishing herein between members of the Quinaeilt reservation and members of the Quinaielt [443] tribe; that the Department was held variously and somewhat loosely, possibly, that recognition by a tribe or remnant of a tribe, can be shown by other matters than that of formal recognition or indorsement in a meeting; by continued living with the tribe, conspicuous service rendered by the tribe, marriage to a member of the tribe; an object to living with the tribe of being made a participant in money or distribution of tribal property, or other extraneous matters of that sort, can be produced to show a continued recognition by the tribe.

THE COURT: How could she be more thoroughly identified with the Lower Chehalis than her association with the Halberts? Of course, she has married three white men.

MR. SPAULDING: They are Upper Chehalis, if the Court please.

MR. ROWLAND: We don't concede that.

THE WITNESS: I don't know.

THE COURT: Can you name a Lower Chehalis that lives around Hoquiam?

THE WITNESS: I would class, I believe, the Chenois families, of Chenois Creek, with the Gray's Harbor or Lower Chehalis Indians. They have been quite closely identified with the Quinaielt Indians or the Indians of the Quinaielt reservation, but they don't live right at Hoquiam; I don't know of any of those Indians who live in Hoquiam.

Q. In that connection, Allen Chenois—did you mention the Chenois family?

A. Yes.

Q. (Continuing)—is a member of that family—Allen [444] Chenois?

A. Yes.

Q. He was on the stand yesterday?

A. Yes.

TESTIMONY OF CHARLES E. ROBLIN ON REDIRECT EXAMINATION.

CHARLES E. ROBLIN further testified that it has often occurred and is the theory of the Government that when a tribe becomes so scattered that there is no *change* for them to keep up a tribal organization, that such members of such a tribe who once had existing membership would not lose their rights to tribal property by reason of that scattering, but that their issue, the second, third and fourth generations, would be in such a position that they could not be recognized as members of the tribe, the difficulty of proof being the principal thing, and the inferred bar of the legislation from the Act of February, 1887, and June 7th, 1897, which insures to

the members of those tribes who were once recognized as such members, the continuance of their rights, but says nothing about the inheriting of such rights by the children; that there must be some place at which a tribe or tribal organization will cease and the legislation has attempted to make it definite, but after the tribe is so scattered that no organization can be kept up, people who once belonged to that tribe would not lose their rights, but that the children or issue would not have an inheritance right.

That he does not know of any existing organization of a Lower Chehalis tribe of Indians; that there were several bands around Gray's Harbor country and the lower [445] part of the Chehalis watershed, but he doubts if there ever was any central organization. He don't know any reason why they should keep up one if there was such a one.

TESTIMONY OF CHARLES E. ROBLIN ON RECROSS EXAMINATION.

That as near as he can get from quite close study of the Indians of this district, the Humptulips and the Indians at the mouth of Grays Harbor were really part of the Quinaielt tribe and that those along the Satsop River and around Montesano and along the lower branches of the Chehalis River were more properly called the Lower Chehalis and were more closely associated with the Upper Chehalis than the Humptulips; that he believes the Humptulips were really a small band of Quinaielt Indians; that it is his belief that the Indians whose ancient habitat was on the Hoh River were associated with the so-called Upper Chehalis.

In re: LULA M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, EMMA S. ELLIOTT, MARION E. ELLIOTT and NORMA C. ELLIOTT by J. H. ELLIOTT, guardian ad litem.

Docket No. 312-E.

In re: EDNA MAY ELLIOTT, RUTH G. ELLIOT, WILLIAM H. ELLIOTT, JOHN G. ELLIOTT, FRANK L. ELLIOTT and JEWELL M. ELLIOTT, by WILLIAM A. ELLIOTT, guardian ad litem.
Docket No. 324-E.

In re: CHARLES G. ELLIOTT, Jr., ANNA MARIE ELLIOTT; HENRY ELLIOTT, RALPH G. ELLIOTT and FRANCES ELLIOTT, minors, by CHARLES G. ELLIOTT, guardian ad litem.

Docket No. 325-E.

In re: AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, CHRIS HENRY, Jr., CHRISTINE HENRY, JUNE HENRY, by Louise E. Henry, guardian ad litem.

Docket No. 326-E.

On argument and order of court Paragraph 2 of the Answer to the Bill of Complaint in cause No. 324-E, may be amended to read "denies each and every allegation" instead of as filed "admits."

Over the objection of the defendant, copy of the record in a former case (272-E, Agnes Elliott, et al.,

vs. U. S.) (Complaint, Answer and Decree) is introduced in cause No. 325-E.

Plaintiff's Exhibit No. 10 (Case No. 325-E) being certified copy of record first above cited, admitted in evidence.)

TESTIMONY OF JOSEPHINE JOHNSON ELLIOTT FOR PLAINTIFFS 312-E.

JOSEPHINE JOHNSON ELLIOTT, being sworn, testified that she is the Mrs. Elliott allotted by decree of this [447] court in the case just read, which was allotted by agreement; that she is the wife of Joe Elliott, who was also allotted; that it is admitted that the plaintiffs in this case are her children—Lula M., Sophie M., Carlyn M., Marion E., Emma S. and Norma C.; that they are still all alive and live at Astoria, Oregon. At the time of her allotment she lived in Dahlia on the Washington side of the Columbia river; that her children were born in Dahlia and lived there as long as she did, but she does not remember how long that was; that from Dahlia they moved to Astoria and that the children now live in Astoria, Oregon; that her husband's business is fishing and he is still engaged in that; that she is an Indian and these plaintiffs are all her own children; that Dahlia is, in her estimation, an Indian settlement, the majority of the people living there are of Indian blood; that she has known Dahlia nearly all the time since her birth; that she has never seen any monuments or a graveyard there, but has heard there is an old one there; that she and her husband are both allotted on the Quinaielt Indian

reservation; that she is 47 years old; that there are fishing stations all along the river around Dahlia; that Indians come from all over the coast of Washington to fish above Dahlia during the summertime; that there are only five white men in Dahlia, and they are married to Indians; virtually the whole population are Indian; that her family lives right in the middle of Dahlia—the place is known as Elliott's Point; that most of them living at Elliott's Point are quarter-Indians; that the nearest town or station down the Columbia River south of Dahlia is a fishing station called Altnoona—that Chinook is right [448] across the river from Astoria—she does not know how far from Dahlia; that it has been a fishing station as long as she can remember; that McGowan is right above Chinook and they employ Indians for fishing, and have for many years; that the Indians who work at McGowan come from Taholah and Bay Center and have been ever since she can remember; that above Dahlia there are fishing locations all along the river—Fitzpatricks' grounds and Farrow grounds; that George Charley comes there to fish;

TESTIMONY OF JOSEPHINE JOHNSON ELLIOTT ON CROSS EXAMINATION.

That she was married in 1905 at Astoria, Oregon; that her children, except the youngest, were born in Dahlia; the youngest was born in Astoria, Oregon; that they left Dahlia eight years ago, having lived there from 1905, and except for four months that they lived at Taholah, they have lived at Astoria, Oregon, since.

TESTIMONY OF JOSEPHINE JOHNSON ELLIOTT ON REDIRECT EXAMINATION.

That Taholah, where she lived for a while, is on the Quinaielt reservation and her children attended school there;

TESTIMONY OF JOSEPHINE JOHNSON ELLIOTT ON RECROSS EXAMINATION.

That they were at Taholah four months, but her oldest girl was there longer, but she did not attend school be- [449]cause she was a high school student at Moclips; that she is not sure, but thinks it was 1925 when they lived at Taholah and just went there to visit at other times—that is, she lived at Taholah four months and visited there at other times, and that her mother and sister live at Taholah.

TESTIMONY OF JOSEPHINE JOHNSON ELLIOTT ON RE-REDIRECT EXAMINATION.

That her mother lived at Taholah until she died in June, but her residence is still there, and her sisters are living there; that she was married in Astoria, went there to get married, and went back to Dahlia within two or three days, and then remained in Dahlia about 13 years; that they visit back and forth across the river at Astoria, from Dahlia; that all her relatives mostly live around Dahlia.

TESTIMONY OF JOSEPHINE JOHNSON ELLIOTT RE-RE-REDIRECT EXAMINATION.

That when she was allotted she was living at Dahlia, but does not know how long ago that was; her

sister put her name on the roll; that when the Court entered its decree regarding allotment, she was living at Astoria, and that is where all her children are living now except one—he is in Vancouver, Washington, on the Columbia River. [450]

TESTIMONY OF JOSEPHINE JOHNSON ELLIOTT ON RE-RE-RECROSS EXAMINATION.

That it is Lula, the oldest, who is living in Vancouver, and the rest live with her at Astoria, and always have.

TESTIMONY OF J. H. ELLIOTT FOR THE PLAINTIFF.

J. H. ELLIOTT testified that he is the plaintiff in cause No. 312-E, and the husband of Josephine Johnson Elliott, and the father of Lula, Sophie, Carolyn, Marion, Emma and Norma Elliott, and Mrs. Elliott, who just testified, is their mother; that he lives at Astoria, Oregon; that his business is fishing on the Columbia River, on both sides of the river; that he was born at Dahlia, Washington, and lived there about 34 years; that they are mostly all Indians who live at Dahlia, probably not over four or five white people; that the children of all the people go to the school at Dahlia, but only two are white children, and the rest, about 20, are Indians; that his occupation has always been that of fishing; that he has lived at Astoria about eight years and fishes out of Astoria now; that he goes around Dahlia regularly—back and forth every week or once a month; that he fishes off the river there; that it is a fishing

point and always has been, and that the Indians fish there; that there are lots of fishing locations south of Dahlia toward the mouth of the river, all the way around Dahlia, and a place down by the mouth of the river is fished by the Indians; that the Quinaielts and Chinooks fish there, but he does not know of any other tribes; that there are lots of fishing locations up the river from Dahlia, toward Longview; they fish all along the [451] river from Dahlia up to Kalama Falls; that it is the same Indians (speaking of the Indians of Southwestern Washington particularly) that fish clear up as far as across from Catalina Island and also below Dahlia to the mouth of the river;

That he is a Quinaielt Indian allotted on the Quinaielt reservation; that he was allotted in 1926, June or March; that the living conditions of his family are no different at all than when they were allotted; that they have always lived as they do now.

TESTIMONY OF J. H. ELLIOTT ON CROSS EXAMINATION.

That his daughter, Lula Elliott, is teaching school in Vancouver, Washington—in the school for white people; that the Indians spoken of, the 18 Indian children attending school at Dahlia, are of the same degree of blood as his children, and that he considers any person with any Indian blood as an Indian; that he has associated with the Quinaielt tribe of Indians in fishing, and in visiting at Taholah; that in 1905 he visited there four months with his wife's mother; that he has not been there since then; that his youngest child, five years old, Norma C. Elliott, has been on

the Taholah reservation in 1925; that it was in 1925 when he was there four months (not 1905), and he visited there the year before that for two days, with his children and family; that he has not associated with any other tribes of Indians than the Quinaielts; that he never received any money from the Chinook tribe; that Dahlia is not on an Indian reservation; that he pays taxes on the land there to the State; that there is a graveyard there at Dahlia; that it is at Astoria he pays taxes to the [452] State; that he has no property at Dahlia; that when he lived at Dahlia he lived with his mother; that he takes his family to Dahlia, but his home is in Astoria; that he has not lived at Dahlia for eight years; that his only association with the Quinaielt Indians has been occasional visits to the reservation.

TESTIMONY OF J. H. ELLIOTT ON RE-DIRECT EXAMINATION.

That there is an old graveyard at Dahlia.

That he is with the Indians most all of the time.

TESTIMONY OF J. H. ELLIOTT ON RE-CROSS EXAMINATION.

That in 1925 he took his first steps to get an allotment on the Quinaielt reservation, about the same time he made the visit of four months there with his family. [453]

TESTIMONY OF LOUISE E. HENRY FOR PLAINTIFF—NO. 326-E.

That she is LOUISE E. HENRY, the mother of Agnes Rubens, Louise Henry Peterson, Mary Henry, Christine Henry and June Henry, plaintiffs in cause

No. 326-E; that the father of these children is a white man to whom she was married in 1890; that she now lives at Dahlia, where she has lived all her life; that her children were born at Dahlia, and all live in Dahlia, excepting one who lives in Hoquiam.

TESTIMONY OF LOUISE E. HENRY ON CROSS EXAMINATION.

That she was married in 1890; that her children have always been associated with only the Quinaielt tribe of Indians, at Taholah, and the Indians at Dahlia where they now live; that her children were on the Quinaielt reservation in 1925 when they stayed a week, but were there at various other times. In 1925 when they were there, was when she started to take steps for allotments for these children, as she had been notified by the head men that they were holding a council meeting and for all Indians to come; that it was Chief Mason who notified her, and they went for the purpose of attending the council meeting; that she don't think she went for the purpose of being adopted on the Quinaielt reservation; that she talked to Mr. Sams in 1925. [454]

On stipulation and finding of the Court, the Bill of complaint in Cause Nos. 300-E and 312-E, are amended as to the selections of land made by the respective plaintiffs, for allotment.

On stipulation of all parties concerned herein, the testimony given in Cause Nos. 312-E, 324-E, 325-E and 326-E, concerning the villages of Dahlia and other villages along the Lower Columbia River being Indian settlements may, and is to apply to the case of Rose Pickernoll and

others, in Cause No. 307-E—the testimony in the first four relating to the villages, to be considered as in 307-E.

Plaintiff's Exhibit No. 10½ being extracts prepared by the Plaintiffs herein from the "Handbook of American Indians," for convenience and reference, is admitted in evidence.

On stipulation the testimony of H. H. JOHNSON (witness next to be called) for the plaintiff and of Charles E. Roblin (hereinbefore called) is to be considered on all cases on trial herein as to allotments and selections and enrollment (in the absence of objection).

TESTIMONY OF H. H. JOHNSON FOR THE PLAINTIFF.

H. H. JOHNSON, being sworn, testified that he lives in Tacoma, Washington, where he is a publisher and has lived in the State of Washington for 20 years; that he was in the Indian service for the United States Government for 17 years; first at Shawnee, Oklahoma; after that 3 years on the Omaha reservation in Nebraska; then at the Fort Lewis Indian School in Southwestern Colorado; then in Oklahoma; then in charge of the Hickory Apache Agency, New Mexico, and in May, 1908, transferred to Washington, with headquarters in Tacoma, having charge of all Indian reservations in Southwestern Washington, supplying allotments of land; that he was often present on the Indian reservations where allotments were taking place; that he is familiar with [455] the method of making allotments according to the Department's regulations pertaining thereto on

the different reservations where he has worked, including the Quinaielt reservation; that the duties of the agent in Charge at Quinaielt are the same as at any Agency—to make a census of the tribe as accurately as possible on June 30th of each year, the object being to keep track of the families.

That in the case of an Indian, who is enrolled and allotted, but who is married to a white woman, and living off the reservation, say at Hoquiam or Bay Center, and a child born to that couple off the reservation, and where the child was enrolled and made application, and made a selection, and made an application for allotment through the Allotting Agent, the practice would be to certify the child, or each member of the family; we would enroll him with the father; that while he (Mr. Johnson) was acting as Agent at the Quinaielt reservation he ascertained to what tribes or bands of Indians the enrolled and allotted Indians of the Quinaielt reservation belonged; that the allotted Indians belonged to numerous bands—Wynooches, Satsops, Whiskahs, Shoalwater Bay Indians are all he could think of then, but numerous bands; that he can name some of the tribes and bands of fish-eating Indians between the Makah Reservation on the north and the Columbia on the South, being those he has just before mentioned, and remnants of the tribe down on the Columbia; that he remembers the Chinooks—that they are a vanishing tribe, the general term being "fish-eating Indians," and were considered to belong to what is generally known as the Chehalis group, also fish-eating Indians; that he is and was acquainted with the tribes of bands around Shoalwater Bay;

that they [456] were enrolled with the Quinaielts and were classed as Quinaielts by him while he was there; that those bands or tribes around Grays Harbor, like the Chinooks at the north end, and other small bands thereabouts belong to the Quinaielts in a general way; that the Quinaielt was the largest single tribe, but they were all considered to be Grays Harbor Indians.

That when he took charge of the allotting work at the Quinaielt Agency it had been under way about a year; that some of the Indians living on the reservation then had already been allotted; that when he took charge there were something over 100 trust patents there for distribution that had been sent to the man in charge of the Agency before he took charge—allotments without adoption in the Quinaielt tribe.

He further testified that he received a letter from Commissioner Luke of the Indian Department about a month before he took charge of the Quinaielt Agency. It was more or less personal—he put it in the Agent's file and hasn't seen it since; that this letter stated "when you arrive at your new station and become familiar with the situation, I wish you to call a council at Taholah and also a council at Bay Center and explain to the Indians why they should take these trust patents that had already been forwarded to the agency for distribution." They had supposedly refused to accept the patents; that is what the letter stated; that in 1906 he met with the Indians at Bay Center and Shoalwater Bay, and apparently the objection to taking the trust patents seemed to be largely from the impression that they

had, that they would be obliged to live on the reservation; he told them that would [457] have nothing to do with it; that if they were entitled to the land they were entitled to it, and did not have to live there, and then they accepted the trust patents;

That the names of William Mason, William Garfield, Anna Copalis and George Charley were on the census roll of the Quinaielt Indians; most of them were on the roll when he took charge; the people around Grays Harbor and Bay Center were also on the Quinaielt roll; that while he was in charge at the Quinaielt Agency, the Indians around Shoalwater Bay were largely oyster men—the oyster beds being located on that harbor and Bay Center. It would be pretty hard to state—the Indians of southwestern Washington went there to pick oysters, migrated from there to the other fishing grounds, according to the seasons, the season at Quinaielt for salmon being April. They went there—not every Indian went because some had employment more remunerative than fishing.

That the Indians of southwestern Washington followed the fishing grounds during the fishing seasons—at Taholah in April, and the Indians would gather there; later in the season to the oyster beds at Shoalwater Bay; "And then go to the mouth of the Columbia River or up and down there. Many times he has had telephone calls from Indians there who got out of money and wanted me to send them money to get home on." That of the Indians allotted and enrolled on the Quinaielt reservation while he was there, very few were pure-blood Quinaielt Indians; that they were just generally mixed with the blood of the

southwestern Washington tribes; that not even the Chiefs were pure blood, being mixed with outside blood; that considerable were intermarried with Chehalis tribes. The Chinook is a [458] vanishing tribe, some of the older people claimed to have Chinook blood, including the Chehalis; that a great many of the children of the Chehalis Indians were allotted on the Quinaielt reservation without adoption; that he recalls one family particularly from the upper Chehalis region in the vicinity of Oakville, above the Satsop, all along the Chehalis River, the Petits—that John Smith had one allotment there; that the Hecks—he should imagine their children—that the Hayden family came from the vicinity of Oakville.

That a former agent, Major Edmund Eels (deceased) had told him that the Chehalis Indians had never had a reservation set aside, so he had gathered together all the adults and took them to Olympia and had them allotted Indian homesteads under the Act permitting homesteads on the public domain; they simply filed, as an Indian homesteader, their selections being made for them; the selected homesteads were filed in one bunch on a tract of land between Oakville and Gate; that such selections were inconsistent with claiming allotments on the reservation for those who might be entitled thereto; that he does not know how many acres these Indian homesteads embodied; that also approximately half a section of land was withdrawn from the entry for school use, but it was not a reservation—approximately 320 acres; that that would allot four Indians under the regulation of 80 acres apiece; that of that piece of school land just above referred to, a portion was allotted to Ada McKay by

Special Executive Order of President Roosevelt in 1908, Ada McKay being a half-blood Skokomish Indian girl, living off the Skokomish Reservation, who had not been allotted; that under his [459] administration no other part of that land was allotted; that when he took charge 20 years ago there was no school there, except a district day school.

That the Chehalis Indians were not parties to the Treaty of Medicine Creek (The Treaty of Puyallup);

That he had never received any instructions to proceed differently with reference to Indians that had been allotted by the decree of the Federal Court than those that had been enrolled and allotted in the ordinary way; that the children of an Indian father and an Indian mother, both allotted on the Quinaielt reservation, would be entitled to be enrolled; that the child of an Indian regularly enrolled and allotted on the Quinaielt reservation but married to a white woman, would be enrolled by him; that is, at the request of a father, a duly enrolled Quinaielt Indian, married to a white woman who had never lived on the reservation—neither of them—that in making up the census roll he would include the names of such a couple at the request of the father; that residence on the reservation would not be a requisite.

On agreement the following question and answer is to be considered as in connection with the case of Kate Walkowsky, 315-E.

That in the case of a full-blood Chinook Indian on her father's side and of the Wynooche band of the Chehalis tribe on her mother's side, married to a

white man in 1893. In 1910 this woman and eight children of the couple were adopted by the Indians of the Quinaielt reservation and the adoption approved by the Secretary of the Interior and later all allotted; that after such adoption and enrollment [460] and allotment three more children were born to this same couple, he would consider it the only thing he could do to enroll the three children born later, and allot them.

That, should this same woman later marry again—a Mr. Weiss, and one child born to them—that is Mrs. Walkowsky and her second husband, Mr. Weiss, her status would not change by the mere fact that there was a different father, since her recognition had been through her Indian blood.

That it is his recollection that the little band of Wynooche Indians was allotted on the Quinaielt reservation.

That while he was Superintendent the census rolls of allotted and enrolled Indians was taken by the Department as proof of what Indian tribe they were members of or allied with; that those rolls were all they had in evidence of an Indian's affiliation and tribal relation.

That he was Agent of the Quinaielt reservation from 1908 to October, 1913, and F. R. Archer was Allotting Agent then; that Charles E. Roblin was not there then; that of the tribes around Lower Chehalis, Chinooks, Bay Centers, around Elma and Oakville, the only band he heard of having any semblance of tribal organization was the Cowlitz Indians on the Cowlitz Prairie near Kelso; that while he was from 1908 to 1913 there was reputed to be a remnant

of the Chinook tribe or band on the Lower Columbia River; that so far as he knows they had no tribal organization; that he was then at that time very familiar with the Executive Order of 1873 and remembers it now in a general way.

That when he took charge in 1908, Mr. Luke, Commissioner of Indian Affairs, spent several days and they went to [461] Quinaielt to go over the Quinaielt reservation; that the same fall he was in Washington and with Mr. Luke had a conference with Mr. Garfield, Secretary of the Interior, and reported his findings; that the Indians had become scattered all over southwestern Washington because they could not make a living on the reservation. They went to the mill camps, lumber camps, anywhere they could secure employment, and that Secretary Garfield stated that that was simply following out the policy the Indian Department pursued in trying to get the Indians to embrace industry, and the ways of the white men and that he felt we should be very liberal in the construction of the allotment of the Indians on the Quinaielt, stating "that reservation was enlarged to provide a home for all these Indians that through their own efforts became scattered in endeavors to make their living." That as he remembered, the Executive Order, that was the object of enlarging the reservation, and that it was proposterous to think that that reservation was enlarged for the purpose of the little bunch of Indians living on it. He stated further that within two years, it was then 1908, there would be a census taking and it was his desire that this census be taken as fast as possible, and to get a full enrollment of all Indian of southwestern Wash-

ington; that this conference, in his estimation, was with regard to the fish-eating Indians of the Pacific Coast.

That he was with the Indian Service when the Act of March 4, 1911, was passed and believes that it simply bore out the instructions he received from the Secretary in that conference—embodied Secretary Garfield's ideas; that he does not believe any difference was noted between [462] the Indians living on and off the reservation.

That he is familiar with the conditions on the Quinaielt reservation, which are absolutely different than on any other reservation that he knows of. The reason is that the Indians on the plains can cultivate a little land and do lease their land to white men and in that way eke out a living, and can therefore stay on the reservations; but in the Northwest the Indians cannot clear the land and cannot make a living on the reservation, and consequently scattered into the white settlements to make a living; he never could see how their scattering mitigated their rights on the reservation; that all Acts of Congress, he believes, were made to raise the Indians to a higher standard of living. Of course, the allotment of land in severalty was a great outstanding act.

TESTIMONY OF H. H. JOHNSON ON CROSS EXAMINATION.

On cross examination, he testified that what he meant when he stated it was the policy, as he understood it, to bring the Indians back on the reservation, was that it was to recognize their rights to the lands; that it was never intended that residence on the reser-

vation was a requisite, but a place where they could secure a way of making a living then or in the future; that he does not consider it possible for the Indians to make a living on the Quinaielt reservation as it is now; that he didn't think they would make a living on this reservation; that it is timbered; that some day it would make them a living;

That during his five years with the Agency the allotment work was going on; that he did not mean that the Quinaielt reservation was created to provide a place where [463] the Indians of Southwest Washington could come in the future and make a living, but meant to provide a place where they could secure lands; that it has been the policy of the Government to provide every Indian with a piece of land throughout the United States, where available, whether they made immediate use of it or not; that whether they could make a living there or not did not enter into it, but whether they had a right there;

That the enlargement of the Quinaielt reservation by the Executive Order of 1873 did not make more fishing grounds; that no more streams were taken in—it simply extended the streams they were fishing on and the fishing was conducted largely at the mouth of the streams; it did not take in any new streams—simply went farther up the old streams; that he has or had no means of knowing whether the fishing question had anything to do with the enlarging of the Quinaielt reservation at that time; that perhaps he did state that he knew what tribe of Indians of this district were fish-eating Indians, but he cannot tell them now, as it has been fifteen years since he was connected with the Indian service; that he cannot

enumerate all the fish-eating Indians, but some of them are Quinaielts, Queets, Quileutes and different bands of their bands; Chehalis, Satsops may have been a tribe at one time, but it is practically a band now; that the Yakimas are not usually classified as fish-eating Indians, as living east of the mountains, are not tributary to the streams—to salt water—that as he understands the term, "fish-eating," it is one whose principal diet is fish; that he thinks all the Indians in Southwest Washington are that class of people. [464]

That by "fish-eating" Indians of the Pacific Coast he would say all the Indians in Southwest Washington come in that category, qualified somewhat in that the Indians on the Prairie are not "fish-eating" Indians—that at a council meeting he attended of the Indians of the Prairie, at the direction of the Department, he intimated to the council that the Government would not favor money payments, but if they made applications for allotments on the Quinaielt reservation they would be heard and considered—having reference to the Cowlitz Indians; that they did not want to come up here and he does not think they were ever allotted, but he was told to tell them they would be considered; that it is just his personal opinion that the Cowlitz did not want to come up here; that he was directed by the Department to tell the Cowlitz Indians to forget the money part of it, but if they would accept the lands, to make application for allotment on the Quinaielt and they would be considered—make application to be enrolled, they would be considered; that he considers the Upper and Lower Chehalis Indians have been considered as one group, rather than tribe; that

in all his dealings with them, and his instructions were along that line of considering them as one group; that he does not think they spoke the same language but does not know; that he thinks the Indians considered them all one band in those days and there was no material difference in their mode of living; that the difference in the method of making a living was general among the Indians of Southwestern Washington—some secured employment from white people, some in logging camps, some followed fishing—some worked at manual labor; that the Chehalis Indians were a farming tribe of Indians;

That it is his recollection that the Chehalis Indians were allotted on the Quinaielt reservation and that the Petit [465] family was one of them; that he does not know if they were given homesteads on the Chehalis reservation or not; that Peter Heck has a homestead on the Chehalis reservation, but that he thinks probably Peter Heck's children were allotted, but does not know; that so far as he knows the Chehalis Indians did not take part in the Medicine Creek Treaty.

That his headquarters while he was Agent from 1908 until 1913 were in Tacoma; that the census rolls were made up both by him personally and under his supervision; that as to the Quinaielt reservation, they had a farmer in charge; that during the year whatever information he could gather such as a birth, or a death, he would make note of it, and at the end of the year would compile those on the reservation as Quinaielts; that then he would go over, get the principal Indians together, check over the roll, correct it—we did this about once a year, in the June, gather up the records of dates of births that the said farmer did

not get—but it may not have been the best way as it was a difficult thing to get an absolutely correct roll—not easy like rolls on reservations where money was involved and every one was anxious to get the names on in case of birth, and off in the case of a death; that one could not expect to place the same reliance upon a census roll made up without that incentive of carrying a money right; Indians living off the reservation would not have the interest to make the trip to the reservation to report and it was up to them to get the information the best they could; that the chief Indians would get together with him and would try to get the heads of families in to testify as to births and deaths;

That he would consider it the best test of an Indian to tribal rights to have that Indian recognized by the tribe as a member; that it could happen that a census roll would [466] carry names on it not rightfully belonging there, and others rightfully belonging there be left off; that errors would occur;

Q. Was it a qualification for allotment during your time, Mr. Johnson, that the prospective allottees be enrolled before being place for allotment?

A. That is a detail that was handled by the Allotting Agent and I cannot answer you that. The Allotting Agent, while we worked concurrently, he worked under separate instructions and that is a detail I cannot answer.

Q. You mean by "separate instructions" he had his particular instructions to perform and you had yours?

A. He was not under me. We worked concurrently but neither over the other.

Q. You collaborated and co-ordinated but each had independent views?

A. Yes, each had independent instructions.

that when he speaks of "enroll" he is speaking of the census roll—roll of the tribe or record of the tribal families; that on the enrollment for allotment during his term as Agent, it was the practice to have the names passed upon by the tribal council before entering them, as to whether they had been recognized or not, and whether according to tribal testimony they were affiliated or part of the tribe by blood or affiliation; that he has known of cases where persons were adopted by the tribal council for reasons of preference alone, persons not otherwise qualified save for tribal favor or preference; that a pure blood Hawaiian from the Islands, the bodyguard of Chief Mason, was adopted into the tribe—but such cases are very rare; that he recalls the case of a white man married to an Indian woman, where the white man [467] was just straight adopted into the tribe—speaking of straight adoption, no question of blood entering in; that if a man is adopted and becomes a member of the tribe, his heirs would be members of the tribe, according to his idea; that he does not see how it can be construed otherwise than as conferring an inheritable right to adoption; in tribal councils it is always considered that when a person has been adopted he has been brought into the family, and they are descended from that person, being lineal descendants of the adoptee and thus included; that it would be lost motion on the part of the tribe to have adopted eight children of the woman previously spoken of, because they already had become members of the

tribe when she was adopted; and that he would say that the children of that woman, when they have children, and their children have children, and so on, they too would be members, the same as a full blood's descendants are members ad infinitum, a person being adopted becoming in the same status as a full blood member of the tribe; that during his time in that capacity that question did not often come up.

TESTIMONY OF H. H. JOHNSON ON REDIRECT EXAMINATION.

That he would consider that three children born to a woman (as in the Walkowsky case) after a woman and her eight children had been adopted into a tribe, would become members of that tribe; that where a woman was simply adopted into a tribe and none of the living children were adopted, that would not hold; the question would be whether the children were born after adoption; that he believes that children born to a person adopted into a tribe previous to the birth of such children, become members of that tribe.

That he knows the Heck family and presumes Lena Heck is of the family of Peter Heck; that he knows the Heck [468] family; does not know the names of the children as he has had no association with the reservation for 15 years; that the Peter Heck family lives on the Chehalis reservation between Oakville and Gate; that he presumes the allotment rolls is a correct statement of facts in stating "Lena 759 and Frank Heck, son of Peter Heck and Arthur 761, son of Peter and Lena, and Norman 762, son of Peter and Lena."

That there was a Hayden family among the Chehalis Indians but does not know about that family particularly nor where it lives.

TESTIMONY OF H. H. JOHNSON ON RECROSS EXAMINATION

That he cannot remember if the Heck family were allotted on the reservation or adopted by the Quinaielt Indians; that the records of the councils should show that; the records of councils will have all that information.

TESTIMONY OF CHARLES ELLIOTT FOR PLAINTIFF—CAUSE 325-E

That he is Charles Elliott, the father of Charles G. Jr., Henry, Ralph and Francis, minors, plaintiffs in 325-E; that he lives at Elliott's Point on the Columbia River and is 56 years of age; that he is an Indian of the Quinaielt tribe and was allotted on the Quinaielt reservation on March 9, 1920; that he has a trust patent.

Plaintiff's Exhibit No. 12—trust patent of Charles Elliott, admitted in evidence.

That he was born at Chinook in Washington; that he now lives at Elliott's Point in Wahkiakum County, Washington, north bank of the Columbia River, right in Dahlia—the name of the postoffice; that it is the Quinaielt Indians who live in and near Dahlia; that the population of Dahlia and Elliott's Point is about 50 and about 90 per cent of the Indians of the Quinaielt tribe; that he knows and associates with J. H. and Josephine Elliott and Louise Henry and knows their children, and his [469] children associate with

theirs; they are together every day and go to the same school; they all belong to the Quinaielt tribe of Indians; that he has always followed fishing as an occupation and fishes on the Columbia river all the way from Dahlia to the mouth of the river; that the principal diet of the Indians living around Dahlia is fish; that Dahlia and thereabouts has been a fishing location all of his life and they fish by seining and drift nets; that Dahlia has been an Indian settlement as long as he can remember, it is on the Pacific Coast, the Indians live there, fish there and have outers' shacks there; that it is known as an Indian settlement because it is built up on the bank of the river, the Indians fish there and *junt* game and ducks there are two old Indian burying grounds there—old relics are found thereabouts, arrowheads, beads; there are old canoes there, clam shells, showing where they camped; stones or rocks with holes dug through them and used for anchors on nets with which they fished, such as they do now; that the fishing stations are about every half mile toward the ocean from Dahlia and that Indians use those fishing locations; the Indians from all along the Coast from the Quinaielt River Basin through Grays Harbor. That there are fishing locations up the river from Dahlia used by Indians and have been so long as he can remember; George Charley goes up there to fish—he knows others but has forgotten their names—Scarboroughs, Old James Julius, Tim Driscoll, his brothers, he himself; that he understands that Driscoll and Jim Julius and George Charley have been allotted on the Quinaielt reservations; that he has attended half a dozen of the meetings at Quinaielt—they had

some he knew nothing about; that he never knew of the Indians at Dahlia having any council meeting that the Indians in the Dahlia community belong to the [470] Quinaielt reservation; that he knows of no separate tribal organization in his community; that all the Indians of his locality associate with each other—the Chehalis, Hoquiams, Humptulips all mingle together; that he and his family live no differently than they have ever lived, no better homes or clothes; that the children of J. H. Elliott, plaintiffs in these cases, are living, Indians, and his nieces and nephews belong to the Quinaielt tribe; that he and his sisters and brothers went up to the Quinaielt reservation and Mr. Mason, the Keeper of the tribe, threw his house open to them and they used his house for two weeks and he told him (the witness) that he belonged to his (Mr. Mason's) people and was related; they stopped, cooked and slept in his house; that they also stayed with Mr. Garfield on the reservation; that Johnnie Cliff and Adeline were there; that he was received all right by all the Indians—welcomed to everything they had—he could have had smoked fish or deer—we cooked right in the man's own house and he sat down and ate with us; we used to go across the river to a place called Woody Island and he knew all the whole country as well as I did; that the Indians all seemed to welcome him and invited him to go hunting with them; that just the week before he visited Johnnie Cliff (or Clipp) there—a full blooded Indian allotted on the reservation; that he saw him last at Taholah, and he has associated with Mr. Mason and a lot of Indians there, some belonging to the Shoalwater Bay and some on the Columbia

River; that he has known Adeline James a great many years; that she previously lived beside his family years ago, about one quarter mile away, then went to Shoalwater Bay and then to Taholah where they have a house; that he had dances with her at Taholah—that as soon as they came in the Indians all came together and had dances and parties—with probably a dozen or 15 [471] present; that his children are minors and have not been at Taholah; each time he went to Taholah they were attending school;

Testifying to the Court's questions; that the "shells" found at Dahlia, a salmon fishery, were clam-shells brought in by the Indians from the mouth of the river, these shells were scattered all over but really although not rightfully belonging there. They are found all along the bank from Dahlia, at places where the Indians had had camping and fishing grounds.

TESTIMONY OF CHARLES ELLIOTT ON CROSS EXAMINATION

CHARLES ELLIOTT testified that he is married to a white woman, has five children, Anne Marie, 18; Henry, 13; Ralph G., 12; Francis, 10, and Charles G. Jr., 16; that none of these plaintiffs have been on the Quinaielt reservation; that he fishes for a living; that Dahlia has a population of about 50 people with perhaps half a dozen families besides his own; that there are Indians living there who call themselves Chinooks; that his association with the Quinaielt Indians has been his visits up there and their visits down to Dahlia when they go there fishing;

That he believes he has visited on the Quinaielt res-

ervation more than half a dozen times but does not remember when he made his first visit, but probably more than four or five years ago, as he has been making yearly visits the past four or five years; that in 1912, his mother and brother went up there to a meeting and he believes he was enrolled then, but it fell through, it being his understanding that the reason for that was that the allotting had stopped, the timberland being considered too valuable for allotment; then later after watching things they went to Mr. Sam's office [472] Mr. Mason, Mrs. Jackson, Mr. Waukenas, and himself belonged there, but they refused us and we had to take it to court;

That his present wife is the mother of his five children; that they were married at his mother's home in Dahlia, are living there now and have been since 1908; that he does not know the distance from Dahlia to the Quinaielt reservation; that there is an ancient burial place in Dahlia where they are still burying people; that he is 56 years old.

That his mother was Lucy Agnes Duchency Elliott, and his father was a white man.

Over objection of Plaintiff's counsel, with exceptions allowed; the following testimony with regard to the line back of the witness's mother was given.

That his mother's name was Mary Rondeau and she was married to Roque Ducheny, whom he never saw, but from hearsay understands he was a half-breed, Indian and French; that he does not know who were the parents of his maternal grandmother, Mary Rondeau; that he never went into details about it, all he knows is that he has heard his mother's

mother say that her mother was a Quinaielt woman; that he does not know anything about his grandmother's father because that is too far back for his time and they never went into details about that at all—hardly ever spoke about it; that he has heard it mentioned, but never took any stock in it, that his great grandmother, his mother's grandmother, was married to an Indian named "Conkumly".

(Admitted by Plaintiff's counsel that witness' great grandmother was married to an Indian named "Conkumly", and that he was a Chinook Indian.)

That his mother's mother, Mary E. Rondeau, lived at Chinook a good many years, and at Dahlia also, that was her last stopping place; she left Chinook and bought a place and [473] lived at Harrington Point and lived there a good many years, and as she was pretty old they took her up to their house at Dahlia and kept her with his mother; that he does not know if she lived all her life before going to Dahlia, at Chinook, but he knows she lived at Chinook first, then Harrington Point, then Dahlia; that his grandmother, Mary Rondeau, died in 1910;

(Admitted by Plaintiff's counsel that Mary Rondeau was not allotted on the Quinaielt reservation.)

That he was living with his present wife at the time the Government issued him his Government patent in 1926; that the reason his children (the plaintiff's) are not present at the trial is because he did not have the means to bring them; that he has cows and pigs at home to take care of, and a motor boat

out on the water—that he had to leave them there to take care of those things while he was gone—that he had two cows; his children are small; that he remembers the trial regarding his mother and himself held before; that Adeline James (or Lohre) who was a witness as to his family history then, is now dead; that Johnson Waukenas, a full blooded Indian, was asked to come as his witness and Mr. Waukenas did come up for the Trial but it was put over a week and the old man and his wife went home and then the old man had a stroke of some kind and was laid; that he had been out to see him the other day and he could not come in; that it is not possible for him to be present at this trial; that Johnson Waukenas and Adeline James, or Lohre, were his principal witnesses in the case regarding himself and his mother.

TESTIMONY OF CHARLES G. ELLIOTT ON CROSS EXAMINATION.

That the way they would have to come to Tacoma from Dahlia it would cost quite a little bit to bring his family Dahlia. [474]

TESTIMONY OF WILLIAM ELLIOTT FOR PLAINTIFFS IN NO. 324-E.

WILLIAM ELLIOTT, being sworn, testified; that he is the father of the plaintiffs in cause No. 324-E; that he is 58 years of age; that he lives at Aberdeen, Washington and has lived there about five years; that he is an Indian of the Quinaielt tribe; that he is allotted on the Quinaielt reservation; that he has received a trust patent for his allotment.

Plaintiff's Exhibit No. 13, being trust patent

issued to William, Plaintiff as guardian ad litem in Cause No. 324-E, admitted in evidence.

That he received the said trust patent in March, 1927; that he was born at Chinook, Washington and lived there about five years; that then he went to Dahlia to live and lived there practically all of his life, with the exception of the last five years; that Dahlia is on the north bank of the Columbia River about 20 miles above the ocean; that practically all the residents of Dahlia, a population of about 50, or 40, when he left there five years ago, were and are Indians of the Quinaielt tribe; that he and his children associated with these Quinaielt Indians; that he, J. H. Elliott and Louise Henry, and their children and that he and his children have always associated with them and their children; that they are Quinaielt Indians; that he is not following any occupation, being laid up with a slight touch of paralysis and rheumatism; that all his life otherwise he has followed fishing in the Columbia River, from the ocean up about 20 miles; that the principal diet of the Indians living around Dahlia and that locality is fish, Chinook salmon, steelheads, blue backs and sturgeon, fresh fish and smoked fish; that there are fisheries all around Dahlia and Chinook from the Columbia bar up for some 30 miles; [475] that these fisheries have been located at such places ever since he can remember; that Indians from all the tribes, so far as he can see, go there to fish, Shoalwater Bay, Quinaielt, Chehalis and Chinook; that Dahlia and Chinook are on the Pacific Coast; that Dahlia and Chinook are Indian settlements; that so far as he knows they have always been Indian settlements;

that they are identified as Indian settlements because for miles along the beach anywhere Indian relics can be picked up of different kinds, steel, stones, bored holes in hammers, arrowheads, spearheads, as he calls them, out of rock; the old burying ground which is very ancient for there never was any burying going on there so long as he can remember; canoes, skulls and skeletons of Indians buried there years ago; also in one of the old canoes, a woman's hair, long and thick and fine; that there are fishing places about every half mile from Dahlia all the way through to the ocean; that Indians, not white people, fish at those locations, that is mostly Quinaielt Indians; that there is a location about ten miles above Dahlia at a place called Katalama and Puget Island, and quiet a few canneries on both sides of Dahlia that came up there lately; that the McGowan cannery is way down at a place called Old Chinook, that mostly Indians fish for and work in that cannery; that ever since he can remember, Indians have fished at these locations; that some of the Indians who fished there are George Charley, Tim Driscoll, Sampson Johns and Henry Strong, that the Indians who fish there are from the Quinaielt reservation; that he has attended three of the Indian councils on the Quinaielt reservation, which were all he could get to at the time; that the Indians who lived at and around Dahlia never had tribal councils or organizations that he ever heard of; [476] that they belong to the Quinaielts; that the Indians of that locality mix with and associate with the Indians north, at Shoalwater Bay, and also with the Chehalis, around Gray's Harbor, the Hoquiams, Humptulips and Quinaielts; that one cannot tell one from the other;

that he and his children live about as they have always lived and associate with the same people they always have; that he knows Josephine Elliott's children and his children associate with hers; that they are Indians of the Quinaielt tribe; that he has always associated with Quinaielt Indians, and offers as an illustration that they go to the reservation, are welcomed at their homes and have a good time; has been to several dances and big feeds and he always says, "make our house your headquarters in Aberdeen," and every time they come up there they come to see us; that prominent Quinaielt Indians, like Robbie Sampson, visited him when he still lived at Dahlia; that Robbie Sampson is an Indian allotted on the Quinaielt reservation; that is about all the association and affiliation he and his family has had, visiting on the reservation for the last five years; go all day Sunday and visit, sometimes take a tent and camp on the reservation and go out fishing and picking oysters and clams and also on the river trout fishing; that the Indians there do not seem to indicate that they are unwelcome; that once when he asked the Indian Justice for a permit to hunt he was told, "You don't need a permit, you are entitled here"; that that Indian justice who told him that is Max Hudson;

That "Old Chinook" was at the place from Scarborough Head to Point Elliott, about 3 miles, now held under tax title by McGowan and renamed McGowan; and Chinook was moved about four miles down to a place called Guyer; that Chinook is not right at Dahlia but nine or ten miles below [477] (other testimony being that it was right at Dahlia).

TESTIMONY OF WILLIAM ELLIOTT ON CROSS EXAMINATION.

That Edna May Elliott (plaintiff in 324-E) is 29 years of age; that Ruth G. Elliott (plaintiff in 324-E) is 25 years of age; William (plaintiff in 324-E) is 23; John is 21, Frank is 13, Jewel is 10; that none of them are present in court; that it has been about 7 years since he lived in Dahlia; that his children are all living with him at the present time; they were born at Dahlia, Washington; that Ruth and Edna are both married, being Ruth Hill and Edna Aronson; that they both have families, husbands working hard, and they could not come as they had to stay and take care of their families; that he is a quarter-breed Indian, that his father was a white man; that for the last five years his children have been on the Quinaielt reservation practically every month, going to Taholah, that Taholah is probably about 30 miles from Aberdeen, that he thinks it is every month, possibly missing a month or two once in awhile, that they go to the reservation; that Dahlia is 20 miles from the Ocean; that besides the McGowan cannery, there is the Altoona Packing Company about 1½ miles below Dahlia; that he would say between Dahlia and the ocean both Indians and white people fish, and probably about half as many white people as Indians;

That he does not know anything about the 1925 census roll of the Quinaielt reservation; that so far as he knows no full-blooded Chinooks live at Dahlia; that there is one full-blooded Chehalis woman, married to a French-Canadian, who lived there, but she died recently; that of late years there have not been any full-blooded Indians there, but there used to be

a great many of them, but they have all [478] died or moved away; that the only association the plaintiffs have had with the Quinaielt Indians is visits and vacations to the reservation during the last five years; that they visited the Lohres and Mrs. Jackson, and he visited Johnnie Clipp and Mr. Garfield about a year ago for a couple of hours; that he visited Mr. Mason, who is in the court room, less than a month before, that is, they talked, he was in a hurry to get out there where they went to big dances, as he played at dances held at the school house at Taholah.

TESTIMONY OF WILLIAM ELLIOTT ON CROSS EXAMINATION.

That he is a brother of Charles G. Elliott, who just preceded him on the witness stand; that he was present when Charles G. Elliott testified as to his ancestral line, that is, his father, mother, grandfather, grandmother and great grandmother; that his knowledge of the family history is practically the same as given by Charles G. Elliott, as he has heard it talked over lots and lots of times.

CHARLES G. ELLIOTT RECALLED AS WITNESS FOR PLAINTIFFS.

That Mr. Mason and Mr. Jackson, who are in the court room during the giving of testimony, have been at Dahlia, Mr. Mason being there last year and stayed practically all day and all night, that he thinks Mr. Mason stopped two nights with the witness' sister Mrs. Henry; that Cleve Jackson and his *eife* visited at Dahlia with Driscoll, but he (the witness) did not get a chance to see them as he was fishing on the river.

TESTIMONY OF ROSE PEERS PICKERNOLL, PLAINTIFF WITH MABEL PEERS WHITE AND AMELIA PEERS ALDEN NO. 307-E.

ROSE PEERS PICKERNOLL, being sworn, testified that she is 57 years old and lives at Dahlia; that she is an [479] Indian; that her mother and father were both Indians; that she was not allotted land anywhere; that a good many of her relatives on both her mother's and father's sides have been allotted land; that she has no brothers, but has four sisters; that her father, an Indian, was Henry Peers, and thinks he belongs to the Lower Chehalis tribe; that he was not allotted land anywhere; that her father's mother was Ellen Pellard, an Indian; that so far as she knows her father's mother was not allotted; that she died before the allotting came; that she does not know how many children her father's mother had, but she knows there was her father, Henry Peers, Mrs. Adeline Lohre, and Archie Pellard; that Adeline Lohre, her father's half-sister, is allotted on the Quinaielt reservation, that is Adeline Lohre and witness's father had the same mother; that Adeline Lohre has seven or eight children who are allotted land on the Quinaielt reservation;

That her mother was Julia Ducheney, Mrs. Agnes Elliott's full sister; that she is 57 years old and has lived at Dahlia practically all her life.

Admitted by defendant that witness will testify that Dahlia is an Indian settlement—practically the same as given by Charles and William Elliott, as to the character of Dahlia.

That she is a first cousin of William, Edna May and Charles G. Elliott; that Agnes Ducheney, her mother's sister, was a full-blooded Indian and has been allotted land and is the mother of William A. and Charles G. and J. H. Elliott and Louise Henry; that she has known these people all her life and lives in the same locality; that she knows the children of all these people just above named and to her knowledge they are all living; William Elliott is living in Aberdeen and the rest at Dahlia, except John; that she knows Charles G. Elliott, Jr., [480] Anna Marie, Henry, Ralph G. and Frances Elliott, who are living at Dahlia; that she knows Lula M., Sophie M., Carolyn M., Emma S., and Norma C. Elliott, and that they are living at Astoria, Oregon, and formerly lived at Dahlia; lived at Dahlia from birth until they were burnt out, that Joe Elliott's house in Dahlia burned down and then they went to Astoria, Oregon; that she knows Louise E. Henry, Christine Henry and June Henry; that they are living at Dahlia;

That she (the witness) is married to an Indian allotted on the Quinaielt reservation; that she is a sister of Mabel Peers White and Amelia Peers Alden, plaintiffs in No. 307-E; that Amelia Peers Alden lives in Dahlia but she cannot attend the trial as she is an invalid; that Mabel Peers White, her sister, is present; that they are full blooded sisters, the children of Henry Peers, an Indian, and Julia Ducheney, an Indian;

That Archie Pellard is a half-uncle to witness, the son of Ellen Pellard, her grandmother; that he is a full-blooded Indian; that Adeline Lohre is her aunt, the daughter of her grandmother, Ellen Pell-

ard; that she had a home at Taholah, on the Quinaielt reservation, lived there, her children were born and raised there; that she visited her aunt, Adeline Lohre at Taholah on three different trips and attended some of the council meetings that the Indians treated her very friendly.

TESTIMONY OF ROSE PEERS PICKERNOLL ON CROSS EXAMINATION.

That she is married to Mr. Pickernoll; that she has been married twice, her first husband was a white man named Gricks; that Nathan Pickernoll, her husband now, is an Indian and he fishes for a livelihood. [481]

CASE OF VIRGINIA WALKOWSKY, CATHERINE WALKOWSKY, ALVIN WALKOWSKY and EDNA WEISS, CAUSE NO. 315-E.

It is agreed between the counsel for the plaintiff and the defendant that the agreed statement of certain facts filed in this case may be received in evidence and the same should be herein inserted in full at this point, as follows:

"That Kate Walkowsky, the mother of Virgina Walkowsky, Alvin Walkowsky, Catherine Walkowsky and Edna Weiss, minors, was born September 1, 1874. That her Indian name was Tah-toh-atl, and that she is a full blooded Indian.

That Kate Walkowsky was born at Oysterville, Washington, on Shoalwater Bay.

That said Kate Walkowsky on January 9, 1893, married John Walkowsky, a white man.

That the following are the names of the children

and the dates of their birth, which were born to said Kate Walkowsky and John Walkowsky:

Albert Walkowsky, born March 31, 1894;
Louise Walkowsky, born August 1, 1895;
Frank Walkowsky, born April 9, 1897;
Ida Walkowsky, born March 3, 1899;
Grace Walkowsky Griggs, born June 28, 1900;
Leonard Walkowsky, born October 26, 1904;
Rose Walkowsky, born June 16, 1906;
Kenneth Walkowsky, born Jan. 19, 1909;
Virginia Walkowsky, born August 4, 1912;
Alvin Walkowsky, born May 17, 1914;
Catherine Walkowsky, born August 26, 1916.

That all of the above named children, with the exception of Virginia, Alvin and Catherine Walkowsky, have received allotments upon the Quinaielt reservation.

That Virginia Walkowsky, Alvin Walkowsky and Catherine Walkowsky were born to the said Kate Walkowsky and John Walkowsky after the adoption of Kate Walkowsky and her eight children by the Quinaielt tribe of Indians. That the said Kate Walkowsky after the birth of the above named Catherine Walkowsky separated from the said John Walkowsky and [482] divorced him and married one Robert Weiss, a white man, by whom she had one child, Edna Weiss, born on the 18th of February, 1919.

That the mother of Kate Walkowsky was an Indian named Spieten, who was a member of the Wynooche band of Indians in the State of Washington. That her father was an Indian named Tatl Tahe, and he was a full blooded Chinook Indian."

TESTIMONY OF CHARLES E. ROBLIN FOR THE PLAINTIFFS 315-E.

CHARLES E. ROBLIN, being sworn, testified that he is the Allotting Agent of the Quinaielt reservation; that he made an investigation to find out and took up with the Department whether or not Kate Walkowsky and her eight children, Albert, Louise, Frank, Ida, Leonard, Rose, Grace and Kenneth have ever been adopted by the Quinaielt tribe of Indians; that the Secretary approved the adoption on September 28th, 1910.

TESTIMONY OF CHARLES E. ROBLIN ON CROSS EXAMINATION.

That he did not have occasion to examine in, and did not do so, the facts and circumstances surrounding the adoption; that he only investigated and found that the fact appears that they were adopted, that Kate Walkowsky applied for adoption by the Quinaielt Indians for herself and her eight children (named above) and her application was presented by the Superintendent to the Quinaielt tribal council and they voted favorably on it as to both the mother and each of the eight children; the Superintendent made a report of that council meeting, submitting the application to the Commissioner of Indian Affairs, and upon his recommendation, the Secretary of the Interior approved the adoption of Mrs. Walkowsky and her eight children by the Quinaielt tribe. [483]

TESTIMONY OF CHARLES E. ROBLIN ON REDIRECT EXAMINATION.

That according to the stipulation filed, these eight children as named, and the mother, Kate Walkowsky, have been adopted by and allotted land on the Quinaielt reservation; that trust patents have been issued for Mrs. Walkowsky and seven of the children; that the eighth child is included in a schedule which he has just submitted on December 19th, 1927, and which has not yet been approved and passed for patent.

TESTIMONY OF CHARLES E. ROBLIN ON RECROSS EXAMINATION.

That subsequently Mrs. Walkowsky presented an application for their adoption by the Tribe in 1922, apparently acting upon the assumption that the old adoption was no good; that he merely surmises that as the reason feeling perhaps she thought it was no good perhaps because she had not received the allotment, the action of the Secretary was ineffective, and so in 1922, she made application for adoption of herself and all of her children (eleven) and he is not quite clear as to what action was taken, he only knows that the application for the subsequently born children has been denied by the Secretary.

TESTIMONY OF CHARLES E. ROBLIN ON REDIRECT EXAMINATION.

The Secretary denied the enrollment, any authority for enrollment of children born subsequently to the adoption of Mrs. Kate Walkowsky and her eight chil-

dren; he does not believe they were voted on, but that the tribe refused to consider any applications;

That under the present rules of the Department children born to Kate Walkowsky, after she and her eight children had been adopted, enrolled and allotted on the reservation [484] even though living on the reservation, and by the same father, such subsequently born children, would not be entitled to enrollment; under some regulations issued in 1904, and he believes changed in 1907, and prior to 1907, he believes children born under such circumstances would be entitled to enrollment; but under the present ruling of the department they would not be entitled to enrollment; that the basis for the regulation is that the adoption by the tribe is a personal privilege extended to the person for personal consideration; that the understanding is that it is a qualified adoption for one purpose only, that they become full members of the tribe adopted into as to their own rights, but not as to any other members of the family; that if Mrs. Walkowsky gave birth to a child after her adoption when she was, say, living on the reservation, and took that child, not a member of the tribe, on the reservation, the Government could have properly excluded that child from going on the reservation, and yet permit her to go on it to live.

TESTIMONY OF CHARLES ROBLIN ON RE-CROSS EXAMINATION.

That so far as he knows, Mrs. Walkowsky is not a resident of the Quinaielt reservation; that in having previously spoken of "subsequently born" children he was referring to the claimants now suing for allotments.

Plaintiffs rest in causes Nos. 324-E, 325-E, 312-E, and 326-E.

TESTIMONY OF HENRY STRONG FOR THE DEFENDANT IN CAUSE NOS. 324-E; 325-E; 312-E; and 326-E.

HENRY STRONG, being sworn, testified, that he is an Indian of the Quinaielt tribe, 66 years of age; allotted on the Quinaielt reservation, but not adopted into the [485] Quinaielt tribe; that he lives at Shoalwater Bay, and has for 30 or 35 years and before that on the Columbia River at a place called Gray's Bay and at a place which was afterward established and called Dahlia; that he lived at what is now called Dahlia for about 15 years; that he knows William Elliott, Charles E., Joe Elliott, Louise Henry, and their families, and has known them all his and their lives, was practically raised with them; that he knew them when he and they were young at Dahlia.

On stipulation, it is agreed, that the testimony of Henry Strong as to the character of Dahlia as an Indian settlement, will be the same as that of the three preceding witnesses.

TESTIMONY OF HENRY STRONG ON CROSS EXAMINATION.

That he was allotted on the Quinaielt reservation about 1908.

TESTIMONY OF CLEVELAND JACKSON FOR THE PLAINTIFFS.

CLEVELAND JACKSON, being sworn, testified that he is an Indian of the Quinaielt tribe living at

Moclips; that he is a Quinaielt Indian by reason of Chief Taholah of that tribe, being his grandfather;

That he knows William A., Charles G., and J. H. Elliott and Louise Henry, and family; that he has known and always considered them as Indians; that he has been through the Dahlia locality.

Agreed by counsel for both parties that the testimony of Cleveland Jackson regarding the character of Dahlia as an Indian Settlement, over the period he is qualified to testify, being but 35 years of age, will be similar to that of the preceding witnesses. [486]

STUART H. ELLIOTT'S TESTIMONY FOR THE PLAINTIFF.

STUART H. ELLIOTT, being sworn, testified that he is one of the attorneys for the plaintiffs in these Elliott cases; that in each case, the parents of these children came to him with certain selections of land, which he submitted to Mr. Roblin, the Allotting Agent; in most cases witness sent them in to the Commissioner of Indian Affairs, he having given Mr. Roblin as much as he knew about the families with a description of the land they were claiming, except in the Joe Elliott and Lula M. Elliott—312-E case, where the record is a little different, as claimed in Paragraph 6, which is admitted, and the next paragraph, to the effect that they were forwarded to the Secretary of the Interior, which is not admitted, but it is admitted that they refused to allot these plaintiffs the land; in case No. 326-E, he addressed a communication to Charles E. Roblin, April 8, 1927, filing selections for Agnes, Christine and June Henry, and

Louise and Hayden, giving their names, telling who the people were, and a description of the selections; in 325-E, he addressed a communication to Mr. Roblin, April 8, 1927, filing selections for Charles G. Elliott, Jr., Ralph G., and Francis, children of Charles G. Elliott who had been allotted by Court decree, and called attention to the relationship, and asked him to take the matter up with the proper authorities; in 324-E, July 27, 1926, he wrote to Mr. Roblin in behalf of Frank G., William, Ruth G., Hill and Edna May Elliott, children of William A. Elliott, telling him where they lived, etc., and the selections to be filed;

That they were all denied allotments, not entitled to allotment or enrollment on the reservation, and that he [487] would not have filed this suit if they had not been; that he is confident that they were denied by a representative of the Department.

It is here stipulated by the parties in all the cases on trial herein, that the plaintiffs in each instance have made selections for allotment and that the allotments have been objected to by the Department.

Plaintiff rests in Cause Nos. 312-E, 324-E, 325-E, and 326-E.

TESTIMONY OF WILLIAM GARFIELD, FOR THE DEFENDANT.

WILLIAM GARFIELD, being sworn, testified that he is an Indian of the Quinaielt tribe and that he was raised on the Quinaielt reservation; that he knows Charles G. Elliott, Jr., Anna Marie, Henry, Ralph G., and Frances Elliott, all minors, (plaintiffs

by Charles G. Elliott, Guardian in 325-E) that he knows the persons whose names were read off; that they are not members of the Quinaielt tribe of Indians; that they do not belong to the Quinaielts.

Admitted by Plaintiffs that this witness will testify to the same effect in each of the cases being considered 312-E; 324-E and 326-E, that they are not members of the Quinaielt tribe.

TESTIMONY OF WILLIAM GARFIELD ON CROSS EXAMINATION.

That he could not name off the names of the children of William Elliott, *of* of Charles Elliott, except Charlie; that he does not know the names of the children of the Elliott's because they never came to Taholah; that he does not know the names of Louise Henry's children, or William G. Elliott; that they live on the Columbia River, where they belong; that he did not know of the Cosmopolis Treaty, but that his father did, was what he meant to tell; that [488] that with regards to Indians, "when Mr. Indian is where he belong, he live there. You white people want to talk about Indians. Well, you don't know it. Look at Sampson Johns. His father lived down there, die there; not like white people, they live where they belong all the time—that is the way of the Indian people."

TESTIMONY OF WILLIAM GARFIELD ON REDIRECT EXAMINATION.

(By the Court) Ask leading questions to save time.

That none of these Elliott children have been adopted into the Quinaielt tribe, that he does not know if they were; that he does not know any Quin-

aielt Indians who live on the Columbia River now; that the Quinaielt Indians live in Quinaielt and will die right there.

Agreed by counsel for both parties hereto that testimony of this witness in each of the four cases now being considered will be the same.

TESTIMONY OF HARRY SHALE FOR THE DEFENDANT.

HARRY SHALE, being sworn, testified, that he is an Indian of full-blood; that he is part Quinaielt and part Quileute Indian, raised on the Quinaielt reservation; that on his father's side he is one of the leaders of the Quinaielt tribe, his father was one of the principal signors of the Treaty, and from his mother's side, the Quileute side, her father also was one of the principal signors of the Treaty; that he has been one hundred per cent interested in the Quinaielt tribe.

(As regards case No. 312-E) That he does not know Lula M. Elliott, Sophie M. Elliott, Carolyn M. Elliott and Marion E. Elliott, Emma S. Elliott and Norma C. Elliott, minor children of J. H. Elliott; that he knows the Elliotts but does not know which is which; that they have not been [489] in the reservation long enough to get acquainted, that he knows about the Elliotts; that he knows the members of the Quinaielt tribe, all of them because he was born and raised on the Quinaielt reservation; that he was appointed head chairman by the Indian Council; that if the Elliott children, children of Charles G. Elliott testified they are members of the Quinaielt tribe of Indians they would not be telling the truth as

he understands it, because the names of the Elliott have been brought before the Council meeting at the reservation, their names were brought before the Council and the tribe turned them down because they were strangers; that they heard the names of the Elliotts three years ago seeking allotments but never before that heard of them and if there had been no such thing as allotments, would not have heard of them then; that he does not know of any Quinaielt tribe of Indians that live on the Columbia River; that they live on the Quinaielt reservation; that as a rule the members of the Quinaielt tribe are stationed there where their fathers were born.

TESTIMONY OF HARRY SHALE ON CROSS EXAMINATION.

That after this suit, about last April, Charles Elliott asked him about some lots and he gave him two lots after he got his title in court; that after that William Elliott and two of his boys had dinner with him at his home at Taholah; that he attended the 1912 Council; that he does not recall if the names of the Elliotts were put up at the time of that Council, as it is such a long time and hundreds of names were brought up at that meeting.

TESTIMONY OF GEORGE CHARLEY FOR THE DEFENDANT.

GEORGE CHARLEY, being sworn testified that he is a member of the Quinaielt tribe of Indians, part Quinaielt [490] his mother was a full blooded Quinaielt, his father a Chehalis and also a member of the Chinook tribe; that he has no white blood in him; that he is very well acquainted with the affairs

of the Quinaielt Indians, knows the history of all the Quinaielt Indians, that is, the living and most of it as to those who are dead; that he does not know Charles G. Elliott, or the children of Charles G. Elliott; that he knows all the members of the Quinaielt tribes of Indians; that he understood Charles G. Elliott is entitled to allotment on the Quinaielt reservation through adoption; that as to Charles G. Elliott's children, he does not know as he never knew them; that he is the George Charley who went and goes to the Columbia River to fish, but that he never associated with the Elliott family down there and never got acquainted with them; that he does not think there are any Quinaielt Indians at Dahlia; that so far as he knows no members of the Quinaielts have moved down there in the history that he knows.

Agreed by counsel for plaintiffs and defendant, that the testimony of George Charley will be identical as to all the plaintiffs in all the Elliott cases on trial herein.

That he does not know of any member of any of the Elliott families ever having attended any tribal feeds or tribal dances, or that sort of thing; that they do have tribal feeds and tribal dances and he goes to them and always has.

TESTIMONY OF GEORGE CHARLEY ON CROSS EXAMINATION.

That they have had tribal dances and feeds; that he never knew Charles G. Elliott until last year; that he has not known him for 15 years; that he met him for the first time last year; that he has fished a

lot around Chinook and [491] down there, but is well acquainted around Chinook Beach but not Chinook; that he has fished there most all the time; that he lives on the Quinaielt reservation part of the time but most of the time in Georgetown and traveling all the time; that Georgetown is near Tokeland on Shoalwater Bay; that Georgetown was named after him.

TESTIMONY OF SAMPSON JOHNS FOR DEFENDANT.

SAMPSON JOHNS, being sworn testified as follows:

On consent of both parties Harry Sahle was sworn and acted as interpreter for the Government, and Cleveland Jackson as interpreter for the Plaintiffs.

That he knows all the members of the Quinaielt tribe; that he knows no member of the Quinaielt tribe by the name of Elliott, they are not members of the tribe; that he has known only one Elliott and that is the attorney; that he does not know any Quinaielt Indians that live on the Columbia River;

(Counsel for Plaintiffs concede the Quinaielt Indians Tribe do not live on the Columbia River.)

That the Chief of the Quinaielts, before his death, had stated to his tribe at Quinaielt at the council meeting that they shall be in, moreover—you might say, ¾ white should not be permitted in to the tribe; all they are after is just timber money and claim their blood to the Quinaielt tribe; that is all they wanted is just the money off the reservation; the Quinaielt

reservation was set aside for the Indians alone; that he does not think the Government or the Indian have a voice in that either, but the Indians who belong to that reservation; in his opinion he feels that there shall be no more land to be allotted to strangers or those who are not related to the Quinaielt tribe; [492]

Regarding questioning as to if he understood what was the definition of "fish-eating" Indians years ago, he stated, "that most all Indians depended on fish for a living along the coast";

That he considers the two Mr. Elliotts who testified, as white people.

TESTIMONY OF SAMPSON JOHNS ON CROSS EXAMINATION.

That he is part Lower Chehalis Indian and part Chinook Indian; that he lives at Copalis, in the neighborhood of 20 miles from the Quinaielt reservation; that most all of the Indian people of the Quinaielt reservation are his close relatives by blood; that he often puts in long times on the reservation as three of his children are married and live there; that he has always lived at Copalis; that he is a full-blooded Chinook and Chehalis Indian and he feels that only Quinaielt Indians should be permited on the reservation as he feels that reservation was made for Indians only.

TESTIMONY OF SAMPSON JOHNS ON RE-DIRECT EXAMINATION.

That generally an Indian does not migrate, leave the home of his fathers and go elsewhere to live; he has heard the Elliott people state that they are blood

relatives of the Quinaielts; he would like to know where they get their information. He was well acquainted with Mary Ducheney, the grandmother of the Elliotts. His mother and father often visited in their home and she told him that she was related to one Hotkis, who was one of the leading people of the Lower Chehalis. [493]

TESTIMONY OF SAMPSON JOHNS ON RE-CROSS EXAMINATION.

That the original home of the Chinook Indians was from below Fort Columbia up to what is called Scarborough Hill, a hill up the Columbia River; that he was never adopted by the Quinaielt tribe, as he did not need to go through adoption as he is blood-related to the leading people of the Quinaielts; that he has hunted sea otter on the ocean in a canoe; that the Upper Chehalis did not hunt sea otter because they were afraid to go out on the ocean.

TESTIMONY OF BILLY MASON FOR THE DEFENDANT.

BILLY MASON, being sworn, testified that he is the Chief of the Quinaielt tribe of Indians; that he knows the four Elliotts, Charles G., his brother, J. H. and Joe—all four who testified; that he does not consider the children of these four Elliotts as members of the Quinaielt tribe because they are not members.

TESTIMONY OF MRS. WILLIAM GARFIELD FOR THE DEFENDANT.

MRS. GARFIELD, being sworn, testified that she is Rosa Garfield, a member of the Quinaielt tribe;

that she knows most of the members of the Quinaielt tribe and has associated with them all her life; that she is about 57 or 58 years old; that she knows the Elliotts but does not know their names, which is which; that she has never seen the children of these Elliotts; that she does not know the children of any of the Elliotts who testified here today; never saw them; that she thinks they belong to the Chinook Indians; that she does not believe any Indians live on the Columbia River; only white people live there; that she does not know the Elliott boys, or their children; that she considers the two men (indicating) as white men; that she does not think she knows of any of her neighbors [494] or friends who are Indians who moved from Quinaielt and made their home elsewhere.

TESTIMONY OF MRS. WILLIAM GARFIELD ON CROSS EXAMINATION.

That she has just heard about the 1200 allottees on the allotment roll of the Quinaielt reservation but does not know who they are, the names—cannot find out the names; that they heard there were that many allottees; that she does not think she and her husband know any of them.

Q. You just know the people who live on the Quinaielt river—Taholah—is that not true?

A. We don't know the names of them.

Q. Now, don't you think, Mrs. Garfield, that any person of half blood or less is a white person? You don't consider them as Indians, anybody less than a half breed?—do you consider those Indians or white?

A. When they are one-eighth, we call them white people.

Q. Now, full blood Indians are like you and Mr. Garfield and these people are (indicating), they don't like mixed breeds?

A. The half breeds *won't* like Indians; they won't look at us.

TESTIMONY OF CHARLES E. ROBLIN FOR THE DEFENDANT.

CHARLES E. ROBLIN, being sworn, testified that he is the Allotting Agent in the Indian Service; that the papers handed to him and referred to by counsel as Defendant's exhibit No. A-3 in the Elliott cases, Nos. 312-E, 324-E, 325-E and 326-E, is photostatic copy of three affidavits made by Agnes Elliott in April, 1912, certified to by the Assistant Commissioner of Indian Affairs as true copies of the original papers on file in the Indian office. [495]

Defendant's Exhibit No. A-3, being photostatic copies of papers, certified to, as first above described, admitted in evidence over the objection of Plaintiff, and exception allowed.

TESTIMONY OF W. B. SAMS FOR THE DEFENDANT.

W. B. SAMS, being sworn, testified that he is the Indian Agent at Hoquiam; that so far as he knows there are no Indians living on the Columbia River that are considered by him as Quinaielt Indians.

(This to go as to all the cases at this time.)

That he has kept a separate, distinct roll of the Upper Chehalis tribe, and always has; that legislation has been passed for the benefit of the Upper Chehalis Indians as a distinct unit, they are mentioned

as a distinct tribe by the Act of Congress, in a couple of years granting it to bring claims against the Government, They mention the Upper Chehalis have a right to sue on their own behalf.

TESTIMONY OF W. B. SAMS ON CROSS EXAMINATION.

That he did not bring that roll of Upper Chehalis Indians with him but can produce it the next day; that he brought the roll of the Quinaielts; that he heard Mr. Johnson's testimony that these Indians including the Upper Chehalis were on exactly the same rolls as William Garfield and the other Indians but that the roll in his office shows that is not true; they never were on the same roll—that at the time Mr. Johnson was there a separate roll was kept even of the Humptulip Indians—in rolls made up separately; that since, after the allotments, the Humptulips have been brought in with the Quinaielts because of being so closely affiliated; that Sampson Johns is now a member of the Quinaielt tribe and on the Quinaielt roll; that after Upper Chehalis Indians are allotted on the Quinaielt [496] reservation they are carried on the Quinaielt roll, those allotted on the Quinaielt reservation by adoption; that since the Bay Center Indians have been allotted they have been put on the Quinaielt roll; that a good many are not enrolled until after they are allotted; that what he means is that the Chehalis Indians have a separate and distinct roll and he has made allotments on the Chehalis reservation; that since he has been superintendent he has made 17 allotments to the Chehalis Indians on the Chehalis reservation of 20 acres each; not homesteads,

but allotments that had been a reserve for school purposes but had been abandoned for a school and was allotted by the Secretary of the Interior to the Chehalis Indians only. Those allotments took all but 5 acres of that land; after allotment there are a large number of Chehalis Indians on the same census roll with the Quinaielts, and Upper Chehalis too, but only after allotment on the Quinaielt reservation. That some of those allotments were made during the first allotments which ended in 1910, and there has been some made since to those adopted since; that there might have been allotments made to Indians never adopted in the early allotments, he does not know, but not in the late ones; that five or six allotments have been made during the recent allotments in 1925, but they were enrolled members of the tribe by adoption; that all members of the Upper Chehalis Indians who have been allotted since 1925 were members of the Quinaielts by adoption; before that he was not the Agent; the names are on the roll, the Heck family, the Haydens, they are Humptulips but have lived up at Oakville all their lives in the Upper Chehalis country, the Petits were adopted into the tribe; that John Smith, the head man of the Upper Chehalis, was dead before he (the witness) went up there; [497] that he knows only of an Ed Smith who lives at Mud Bay but not on the Upper Chehalis reservation; that some of Ed Smith's children were adopted; that Peter Heck and Joe Petit are considered the head men of the Upper Chehalis and two of Joe Petit's children were adopted and allotted; that there are but 15 or 20 or thereabouts of Upper Chehalis Indians on the roll, that is about 12 or 14 or somewhere along there have

been adopted and allotted; that the Parsons family at Oakville he thinks was adopted too; that they are Lower Issaqually Indians who have lived over there all their lives; that the Hayden family consisting of John, Bertha, Jessie, Charlie and Julia were in the first allotment and in the second allotment since 1925, Lilly Hayden, Elmer, John, Jr., Clifford, Dorothy and John Junior; that one Heck *sone* has been allotted on the Chehalis reservation; that Charlie, Mary, Walter, Andrew and Lawrence Petit are now at the Castle Rock country and do not belong to the Chehalis reservation; they are related to the Quinaielt tribe; they were allotted because they were adopted by the Quinaielts on the Quinaielts reservation; that Mary Barichio who is not a plaintiff in these suits lives on the Chehalis reservation, Bay Center is where she belongs; that this man named John Smith, died before he (the witness) came there; that his daughter Maggie, is married to a Petit and her two children were allotted by adoption; that the reason he answers that all that he has been asked about have been allotted because they were adopted, is because they were; that all the Indians that have been named to him are adopted Indians on the Quinaielt roll; that as to the ones allotted on the early schedule, he cannot say as he can find a record of the adoption of only a few of those; just a few, but he does not know how they were [498] allotted; that he thought they were speaking of all Indians; that as to the Upper Chehalis Indians he does not know of any Upper Chehalis allotted in the early allotments; that referring back to the Hayden family spoken of in questioning and testimony, they are not Upper Chehalis, they belong with

the Oihoit crowd; that the census rolls and the early allotment instructions not produced were introduced in the Elliott cases and are now in San Francisco; that he had asked for their return but the Clerk had told him he could not get them.

TESTIMONY OF CHARLES E. ROBLIN ON DIRECT EXAMINATION RECALLED FOR DEFENDANT.

That Charles Petit and his wife, Mary Petit and children, Ernest, *Adnrew* and Walter Petit were adopted in 1909 by the Quinaielt Indians, the adoption and enrollment being approved by the Secretary of the Interior on August 30, 1909; Lawrence and Blanche Petit, children of Joe and Maggie Petit were adopted at the council meeting of June 26, 1925, and the adoption approved by the Secretary of the Interior on September 29, 1926, the last being allotted by him, and the others by Mr. Archer in 1910; that his record would not show what tribe any of the other Indians mentioned as belonging to the Upper Chehalis in the previous testimony, belonged to.

TESTIMONY OF CHARLES E. ROBLIN ON CROSS EXAMINATION.

That he first came to the Quinaielt reservation to go into this work in 1916; never had anything to do with the Quinaielt reservation prior to that time.

Government rests in the Elliott cases. [499]

Case of KATE WALKOWSKY, CATHERINE WALKOWSKY, ALVIN WALKOWSKY AND EDNA WEISS, Docket No. 315-E.

TESTIMONY OF KATE WALKOWSKY FOR PLAINTIFFS.

MRS. KATE WALKOWSKY, being sworn, testified that she is 53 years of age and that she lives at South Bend; Washington; that she is the mother of Virginia, Catherine, Alvin Walkowsky and Edna Weiss; that she is a full-blooded Quinaielt Indian; that South Bend is on Shoalwater Bay; that Virginia is 15 years of age; Alvin, 14; Catherine, 11; and Edna, 8, and that they all live with her; that none of them except Edna, the youngest, are present in court with her; that she supports the children; that three of these children were born in Oysterville, and Edna in South Bend; that they never lived any place but on Shoalwater Bay; that the father of the first three was John Walkowsky, a white man engaged in the oyster business at Oysterville; that these children, the plaintiffs for whom she is now suing, were born, reared, and are now living as she and her other children who have been allotted lived; that they live no differently than they did 25 years ago; that she (the witness) was born in Dahlia and has lived in the locality all her life, having gone to Shoalwater Bay when she was 12 years old and her sister having died, and lived at Shoalwater Bay ever since; that there are a few Indians living in the immediate neighborhood of where she lives, Mrs. Oliver and family; Mrs. Woodcock, a sister of Mrs. Oliver, and the Armstrong family; and many other families—cannot think of any

others by name—yes, the Calhoun family and the Bailey family; that the Pickernoll family live at Bay Center; that all these Indians she has named and that have been named to her are Indians and have been allotted [500] on the Quinaielt reservation; that she knows Frank Hyasman, who is allotted and lives at Taholah on the Quinaielt reservation; that he is related to her; that she has no other relatives allotted on the Quinaielt reservation other than Frank Hyasman and her own children, that she knows of, can remember; that she was married to her last husband in 1919; that he is dead and while he lived they lived in Oysterville, just across from South Bend; that since her marriage to Mr. Weiss she has been living in South Bend.

TESTIMONY OF KATE WALKOWSKY ON CROSS EXAMINATION.

That she does not know when she became a member of the Quinaielt tribe; that she was adopted but does not remember the year, it has been so long.

(Date of adoption admitted by plaintiffs in the Statement.)

That her father's name was Joe Mose (admitted to be a Chinook Indian).

That her mother belonged to the Quinaielts; that she (the witness) has never lived on the Quinaielt reservation, but she is living among Indians right now; that she has attended a tribal meeting of the Lower Chehalis Indians at Montesano about two years ago; that her children did not attend that meeting; that her oldest child was 15 years old and that he goes to school.

TESTIMONY OF KATE WALKOWSKY ON REDIRECT EXAMINATION.

That her youngest child, Edna, is in court.

(Said child is pointed out and stands up.) [501]

TESTIMONY OF MRS. KATE WALKOWSKY ON RECROSS EXAMINATION.

That she is a full-blooded Indian; that her mother died when she was two years of age and her father when she was quite young and that she was reared by an old Indian woman by the name of Mrs. Mary Wilson, who was related to her; that Mary Wilson adopted her when she was a child, when her mother died; that her mother died at Dahlia; that she does not know the population of Dahlia as she was a rather small child and it has been some years since she lived in Dahlia; that before that place was called Dahlia, it was called Pillar Rock.

Plaintiff rests, with case to be held open as to Bay Center and South Bend Indians, or really consolidated with immediately following cases.

Defendant rests on filing second amended answer. [502]

Cases of MARY BARICHIO PETIT; MORRIS PETIT; ELLIS A. PETIT; OSCAR BRIGNONE, Minors by PAUL PETIT, Guardian ad litem. Docket 320-E.

DEWEY BARICHIO; LEDA E. BARICHIO; ROMIE D. BARICHIO; ANDREW B. BARICHIO, Minors by VINIE WILSON BARICHIO, Guardian ad litem. Docket No. 321-E.

TESTIMONY OF L. L. BUSH FOR THE PLAINTIFFS.

(Testimony of this witness to go as to Kate Walkowsky also.)

L. L. BUSH, being sworn, testified, that he is a farmer residing at Bay Center, 61 years of age, has lived in the State of Washington 57 years and of that time for 51 years at Bay Center; that he has several lines of small interests, but calls himself a farmer; that he lives toward the southeast part of Bay Center, or on Shoalwater Bay; that he has personally known the Indians and their families around Shoalwater Bay for 50 years, most of them; that he was 4 years old when he went to Shoalwater Bay; that he is acquainted with the Indians around Oysterville, but that there are few of them there now, and with those that have been there in years gone by; also at South Bend and other points around Shoalwater Bay; that so far back as he can remember he is acquainted with the Indian history of that district; knows most of the surviving Indians around Shoalwater Bay and has been acquainted with perhaps all of them who have been

around there as residents in the past 30 years; that all he knows about what reservations they are enrolled on is by common report; that he has not seen any rolls; that they are allotted land at Quinaielt;

That he knows Kate Walkowsky and has known her since she was a young girl; that he knew her husband, Mr. Walkowsky, engaged in oystering, mostly; that he does not [503] know her children by individual names, but by sight as members of the Walkowsky family; that she was considered as an Indian; that when she would come to Bay Center, she visited Indian people; that he did not know her father personally, but traditionally he was a Chinook Indian; that he did not know her mother, but traditionally she was a Wynooche; that the Wynooche band is a branch of the Chehalis, on the north side, the lower part of the river; that his knowledge of the Indian bands around Shoalwater Bay and Gray's Harbor and north as far as the northern boundary of the Quinaielt reservation is from having wrestled, boxed, gone to school, worked and been friendly with them, learning some of the Chinook jargon and of the Chehalis language, more or less, as a boy; has been inquisitive of their ways, talked them over with some of them, and with a few men as to the ethmological relations, and has the acquaintanceship of Dr. Borah of the Columbia University, who is compiling a Chinook textbook, and derived much information from him; sometimes corresponded with the Smithsonian Institution as to questions of Indian races, and with Dr. Frank Tenberg, who 15 years ago was here attempting to get trace of the language or grammar of the Silliquah Indians; that as regards the tribes or bands

of Indians, those living in the communities about Gray's and Shoalwater Bay belong to he would say, that in his country there are main stocks of Indians represented by the Chinook, Salishan and Athapascan; the Chinooks represented by the Chinook proper on the Columbia and the Willapah Bay, and the Willapah, distantly related to the Chinooks; the Salishans represented by several smaller bands on the north side of the Willapah Bay, all roughly classing themselves as Lower Chehalis, and a little band called the [504] Kwalhioquas, representatives of the Athapascan family, inhabiting the coast range between the head of the Willapah and the Chehalis River; that none of the Kwalhioquas are surviving; that but three were left in 1850 but are represented in small fractions of blood among others; the Lower Chehalis, the Westport band, which was the place from which the Chehalis came, were closely affiliated with the Shoalwater Bays, that is, with the Salishans and other larger and smaller bands, like the Whiskahs, Humptulips; that he went from the Shoalwater Bay Group to the Gray's Harbor when beginning to testify about the Chehalis Indians, Lower Chehalis; that the Satsops were the easternmost of the Lower Chehalis, with a dialect sufficiently different from the rest of the Lower Chehalis to make conversation between them difficult though understandable; that he, himself, speaks the Chehalis tongue somewhat; that his vocabulary is not large but he can carry on a conversation with them;

That since his acquaintance with them the Indians surviving around Shoalwater Bay itself do not regard themselves as having any separate tribal organization, having lapsed prior to his (the witness) personal ac-

quaintance with them, they are survivors of the Chinooks, Willapahs, Shoalwater Bay bands of the Lower Chehalis, and then some have drifted in from Clatsops, and one or two from up the Columbia River; it was long after tribal affiliation ceased and they just affiliated in a general way with a general *bundh* of Indians in Willapah Bay;

That so far back as he can remember the relations of the Indians living around Shoalwater Bay with the Indians about Quinaielt, have been the intermarrying, even as to the persons of high rank, intermarrying back and forth along the Coast; that north of the Quinaielts are the [505] Quileutes, of entirely different family and of traditional hostility and they have not mixed so much;

That as to the Indians around the Gray's Harbor, they have mixed with the Indians more or less along up and down that part of the coast; that they have fished together up and down the coast at all coast fishing points, but possibly, of course, where there is the heaviest industry; the Columbia River for the salmon; lesser degrees in Willapah Bay, Gray's Harbor and Quinaielt; in oystering on Willapah Bay; that the oyster beds have been worked since 1851 or 1852, from what he has learned, as a commercial proposition and as an article of diet of the Indians, since time immemorial;

That he understands the term "fish-eating" Indians of the Pacific Coast and that it means "one whose diet is largely or predominantly the fish that are gathered either from the open sea or coastal streams"; that "of the Pacific Coast" he understands to mean

"anywhere from Cape Flattery to the Columbia River—the mouth of the Columbia River";

That at his first acquaintance with the Indians they considered themselves as being in a general way, or as a general bunch or aggregation under the authority of the Quinaielt Agency, and the Agency in years back, did in point of fact, exercise police supervision and authority over the Indians, at least as far south as his home in Bay Center, citing as a particular instance, a homicide case some 45 years ago, there being an uncertainty as to whether it was homicide or accidental or intentional, a relative of the deceased took it upon himself to investigate and wreak vengeance; the Quinaielt Agency called all parties concerned together and decided they had insufficient evidence to act as to the homicide and the personal avenger—they impressed upon the avenger that he must go back home [506] and dismiss such thoughts from his mind;

Also in a triangle case, the Quinaielt Agency sent a representative down for the man, an old Indian who had tired of his wife, and took the woman to the Agency, and impressed upon them the necessity of living up to the laws in such cases;

That he was in court when H. H. Johnson testified and heard, he supposes, most of the evidence; that he heard Mr. Johnson's testimony that the tribes and bands around Shoalwater Bay were always considered, during his station at the Agency, as part of the Quinaielt Agency, and that he (the Witness) believes that was their understanding; that he met Mr. H. H. Johnson on various trips when the latter was down there on errands; that one instance in particular was

the case of an old Indian who did not want to accept his allotment, which had to be given to him in some one's else care; that the Indians seemed confused as to whether they were required to live on the reservation and did not want to go and live on the reservation for the reasons they stated there was not enough room for them to make a living, being only a narrow harbor and much timberland, and they would not have anything to do. That he does not remember ever having heard Mr. Johnson tell them, or any of them that they would not be required to live on the reservation, but knows that that was their understanding of it, as a body;

Q. Do you understand the meaning of the term "fish-eating Indians of the Pacific Coast"?

A. Yes.

Q. And what do you understand that term to mean?

A. One whose diet is largely or predominantly the fish that are gathered either from open sea or coastal streams. [507]

Q. "Of the Pacific Coast"—how do you define that with reference to the State of Washington?

A. Why, it would be anywhere from Cape Flattery to the Columbia River.

Q. That is on the Columbia River?

A. The mouth of the Columbia River.

That he knows the Barichio and Petit's family; knew Mr. Petit's father and mother before they were married; knew Barichio's mother and father before they were married, and has known their families ever since; that he believes the grandmother, Elizabeth Springer, as to the original ancestry, he thinks, was Shoalwater Bay, with ancestry from two or three different bands around Willapah Bay; as to Lower

Chehalis blood, that the north part of Shoalwater Bay belonged to the Lower Chehalis; that the grandmother's Indian name was, he thinks, "Ahh-Ahlah"; that she was a full-blooded Indian;

Speaking of the Barichio family, that the father of her children was a man named Barichio, a white man—an Italian, but now her husband is a man named Springer;

That Elizabeth Springer's children, were Ellen, Emma, Lena, Tanio, Frank, John, and Mary Springer, as far as known to him; that Frank is living and allotted on the Quinaielt reservation; that John and Lena are allotted on the Quinaielt reservation; that Mary, one of Ahh Ahlah's daughters also, was married to an Indian named Franklin, but she died about 40 years or so ago; that she had one son Henry, who was allotted on the Quinaielt reservation; that Tanino, another of Ahh Ahlah's daughters died before allotments were made, but that she was married to Archie Pellard; that he understands Archie Pellard is a plaintiff in one of these cases; that he believes Ellen Springer is dead, and is not clear whether she was allotted; [508]

That Frank Barichio married Lena Givens, reputed to have some unknown degree of Indian blood in her, but mostly white, that they had three children, Dewey, Mary and Lena; that Dewey and Mary, he understands, are plaintiffs in a suit herein;

That the said Dewey Barichio is married to Lavina Wilson, an Indian woman, allotted on the Quinaielt reservation; that the father of Dewey is an Indian, and Lavina Wilson is an Indian; that they have three children; Andrew Bammert Barichio, the second a

girl, Sister Alta, and the third he does not know the name of—a small child; he has no information as to whether these three children are plaintiffs herein;

That he knows Mary Barichio, married to Paul Petit, allotted on the Quinaielt reservation; that he understands that Mary Barichio is one of the plaintiffs in one of these suits; that they have two children, a boy Norris, and one they call Ellis, or Buddy; that he understands they also are plaintiffs in a suit herein;

That Lena, married to William Calhoun, is the great-aunt of Dewey and Mary Barichio; that William Calhoun is an Indian and is allotted on the Quinaielt reservation; that they have four children, being, in the order of their ages, Sampson, Edwin (or Edward) Tanina, called Nina, and Rose, or (Rosebud); that they are Indians allotted on the Quinaielt reservation;

That Ellen Amelia Barichio had a large family; that he knows some of them; that on long study he might dig up from recollection whether they were allotted anywhere.

That he knows Oscar Brignone (plaintiff in 320-E); that Oscar is the son of Joseph and Matilde Brignone; that Joseph Brignone, who died a few years ago, was an Indian, [509] but does not know whether he was allotted anywhere; that Joseph Brignone had several brothers and sisters of full-blood and of half blood; a brother, Anton, was still living a year ago, but he does not know whether he was allotted anywhere; that he cannot recall definitely the names of the sisters, one, he feels might be Rose; that the father of Oscar Brignone was a man

by the name of Brignone, who lives on the Columbia River, and his mother, was Ellen, the daughter of Ahh Ahlah; that Ellen was married to a man named Amelia; that it comes to him that she was allotted under the misuse of the name Springer, Ellen Amelia Springer; that Ellen Amelia's mother was Ahh Ahlah, or Elizabeth Barichio, first, and then Elizabeth Springer; Springer was Ellen Amelia's stepfather; that Ahh Ahlah was the mother of Frank Barichio, the old Indian to whom the others, except Brignone, trace their origin; that Elizabeth Springer is the one from they have descended.

That, as he previously testified, Paul Petit is the father of Norris A. and Ellis Petit, and their mother is Mary Barichio Petit; that Paul Petit is an Indian allotted on the Quinaielt reservation; that Paul Petit's father was an Indian called Jimmy; that he did not know whether this Jimmy was allotted; that Paul Petit's mother's name was Ida Strong Petit, an Indian, but he does not know if she was allotted anywhere;

Admitted by the Government and agreed that Jimmy and Ida Strong Petit, father and mother of Paul Petit, are allotted.

TESTIMONY OF L. L. BUSH ON CROSS EXAMINATION.

L. L. BUSH testified that he lives at Bay Center; that originally it was usually the home of the bands of the Chinook Indians, but the boundary between the Chinooks [510] on the south and the Lower Chehalis varied somewhat back and forth; that from what he knows the tribes of Indians who lived there originally were some of the Chinooks from time to time,

and some of the Shoalwater Bay bands from the Lower Chehalis from time to time, and some who were part of the Snohomish, or Willapah blood, and others who occasionally drifted in; that is all, that there was no tribal organization for some years even before his personal acquaintance with them; that of the plaintiffs known to him herein, the ancestry is scattered around; that he does not know whether he is acquainted with any Indian whose ancestry goes back to any one single band or tribe; that these Indians who have inhabited Shoalwater Bay have all disintegrated and parted—tribes originally there, like the Chinooks are no longer there; in the last few years they formed a business organization, but no tribal organization has been maintained by them for many decades; that he cannot recall that any of the Indians of that neighborhood attended any of the meetings of the organization of the Chinook tribe, except as spectators like himself, not as participants; that so far as he knows, none of the plaintiffs as named to him, attended a meeting of the Chinooks as participants, and he was there part of the time looking on.

That the Willapah tribe of Indians have disintegrated and passed on so much so that nobody left has more than a quarter-blood of that tribe, if that much; that he can remember no meeting of the Willapah tribe ever having held; that as regards the ancestry of any of the families mentioned by him, coming from the Lower Chehalis tribe of Indians, that in the case of Mrs. Walkowsky, while she was brought up by a foster mother at Bay Center, he believes her mother a Wynooche; that this Ahh Ahlah

mentioned, is the ancestor, [511] some Shoalwater Bay, some Willapa, some Chinook, does not know what fraction, her English name being Elizabeth Springer; that she did not hold herself as belonging to any of these tribes, just the general aggregation of Shoalwater Bay, having headquarters at Quinaielt; that is not to any local organization; as regards the Quinaielt Indians, the Agency for the Quinaielt Indians had headquarters at various places from time to time; sometimes at Olympia, usually at Quinaielt, but also sometimes as the Government would change the organization, the Agency would be moved here and there, at the times specifically mentioned regarding police supervision, the Agency was at Quinaielt, or Taholah, the Quinaielt reserve, in the first instance 45 or 46 years ago; that the Indians all over the State spoke of the place of the headquarters as the Quinaielt; whether authoritative agency or local organization, it was alluded to as Quinaielt; that it is his impression that the arrangements by the Government consolidated some things and put the main agency at Cushman School, Tacoma, but it was after that and it was his impression the real authority was at Quinaielt; that he does not date the agencies clearly as in some instances he was only a boy, but the names of Milroy, Wood, Henry, Willoby, Eals, are all in his mind as having more or less exercised authority at Quinaielt; that in those early days, three or four decades back, he heard no mention of anything except Quinaielt as headquarters, except that it is his recollection that a Mr. Eals was always regarded as authority for any opinion, but the only location he heard referred to he believes was Quinaielt;

That he presumes he did state that the Indians around Willapah Harbor (Bay) and Shoalwater Bay migrated for fishing purposes on the Columbia River, that they did go back [512] and forth up and down the Coast;

That so far as he recalls, only one adult, Dewey Barichio, is named among the plaintiffs herein mentioned by him as going down to fish; that he and the mothers and fathers and husbands of such plaintiffs do now leave their homes and go South and fish on the Columbia River at seasons, and sometimes pelagic trolling (open sea trolling); that there are white fishermen in that district; that the only difference between the Indian and white fishermen is that that the Indian is more apt to be exclusively fisherman, while the white man is more apt to be a fisherman on the side; that these plaintiffs fish the same as the white people do, up and down the Columbia, except that some of them have gone occasionally up to the Quinaielt, not in large numbers for there are small streams, but they occasionally go to the Quinaielt and he knows of no white man who goes there or has gone there to fish, nor does he recall any white people who have gone up that way sea-otter shooting.

That he has lived in that vicinity approximately 50 years; that the land held there is taxable land, returns taxes to the County and State, speaking of the land at Bay Center; that there is the little reserve at Georgetown, (not on the Bay Center side) that is not State held land, but in the main, except the territory involved in these matters, the property is taxable land; that the land in his territory has been taxable

land for something like three-quarters of a century, at various periods as far back as the 50's of the last century it has been taxed land—some of it, that is, the first few tribes who occupied it dated back that far.

That as regards their history before his recollection [513] he used to talk over with them their myths and legends sometimes; that before his time he understands they took their furs to market at Astoria, Oregon.

(On interrogation by the Court); that even back before his first contact with them, local or traveling buyers, mostly from Portland came in there and bought the furs locally; that he could hardly imagine any Indian tribe that did not use the fur of the bear, beaver and otter; that he does not know what the Upper Chehalis had to sell; they came down Willapah Harbor way and he was in Willapah Bay; that he understands their market was down in Gray's Harbor, the villages that started at Gray's Harbor, Montesano and Elma, after the white settlement and before the white settlement there, he understood their furs were collected by traveling traders that went up through the Cowlitz Valley; that so far as he had heard mentioned; tribal affiliation was more with the Lower Chehalis than the Cowlitz;

That he is not aware that the Interior Indians had either to find a market interior or had to sell through the Indians or Indian organization or tribe that held the mouth of the river, the end of the trail on salt water, except a tribe which belonged to the same Athapascan family with the Kwalhioquas up between Willapah and the Chehalis; they had formerly been

in the upper waters of the Chehalis, settled on the Oregon side and were more savage and exacting in taking tribute; that he never heard of the Upper Chehalis Indians trading furs at Astoria, going down by the ocean, outside; that they did not go outside with their canoes for traffic purposes, only for hunting purposes as a rule; that he has also understood that the Upper Chehalis did not hunt for sea otter outside the Upper Chehalis, but believes the witness who previously so stated, has forgotten [514] several instances; that he could not say that the said witness who so testified was right as a general proposition that the Upper Chehalis did not go outside to hunt sea-otter; that sea-otter hunting did not take a large number of people; that as a general rule the Upper Chehalis did not, as his impression is, that ocean-going canoes were made as far up the river as that.

W. B. SAMS RECALLED—TESTIMONY ON DIRECT EXAMINATION.

That in his previous testimony that there had been legislation passed prohibiting the Chehalis and other tribes of Indians from suing for damages sustained from the United States or other Indian tribes, he was referring to suit in the Court of Claims and was referring to the Act of February 12, 1925; that act authorized claims to be brought by the Indians who signed the Medicine Creek Treaty, the Point Elliott Treaty, the Quinaielts, the Mukleshoots, the San Juan Islands, the Nooksaks, Chinooks, Upper and Lower Chehalis, Humptulips, or any of them, and many of the Indians provided for in that Treaty were Indians who had received allotments of land;

The Treaty further provided that if any of them had received allotments of land, the Government might counter-claim anything which would be recovered under this Act, might counter-claim what they received for the allotments of land; the Quinaielts, who had received a reservation, were mentioned; that he does not know 'at long distance' of another act which extends that kind of remedial legislation to all tribes of the United States; that he is not familiar with anything but this case; that the signature exhibited to him is his. [515]

Plaintiff's Exhibit No. 13, letter written by Mr. Sams to Stuart H. Elliott, January 20, 1925, admitted in evidence.

That since that letter was written he has had evidence that the wife of Paul Petit has *avery* small degree of Indian blood. [516]

Case of ARCHIE PELLARD, Cause No. 306-E.

TESTIMONY OF ALLEN CHINOIS FOR THE PLAINTIFF.

ALLEN CHINOIS, being sworn, testified, that he lives on Chinois Creek below Hoquiam; that he is a full-blooded Indian allotted on the Quinaielt reservation; that he knows Archie Pellard well enough, had always been with him; that he is an Indian of half-blood; that he has known him all his life; that he recognizes him as being an Indian entitled to rights on the Quinaielt reservation; that Archie has associated and affiliated with the Indians of the Quinaielt reservation; that in 1914, 1915, 1916 and 1917 he was over *ther* at

Taholah building boats for the Indians; that he fished the Quinaielt river in 1914 and 1915; that Archie Pellar has a sister, Adeline, allotted on the reservation; that he has possibly six or seven nieces there; that he has other relatives; that he (the witness) cannot prove that he is related to Archie Pellard in any way; that Archie Pellard stayed with Johnson Wauketas, but does not know if they are related; that Archie Pellard was married to a half-breed woman, who is now dead; that Archie Pellard was associated with the baseball team at Taholah for Indian boys in 1915, 1916, 1917, and in 1922 and 1923; that Harry Shale managed it the first season; that Robert Sampson was another one of the officers; that Archie Pellard had no children; that Archie Pellard came from Bay Center; that his mother was a full-blooded Indian; that his father (Archie Pellard's) was a Frenchman; that Archie's mother's name was Ellen; that Archie Pellard had a pile driver or hand driver on the Quinaielt fishing locations working for the other Indians there. [517]

TESTIMONY OF ALLEN CHINOIS ON CROSS EXAMINATION.

That so far as he knows Archie Pellard was never excluded from the reservation by action of the tribe; that he does not know of Archie Pellard ever having trouble with the Indians of the reservation with regard to fishing; but that he has been closely associated with him all the time.

L. L. BUSH, RECALLED AS WITNESS FOR PLAINTIFF.

L. L. BUSH, being sworn, testified that he knows Archie Pellard and that he is an Indian of half-blood degree; that he knew Archie Pellard's mother, who was a full blood Indian; that he has a faint recollection that Archie's grandmother was born somewhere within the Lower Chehalis territory; that she married and moved or was married over at Chinook and that Archie's mother, Ellen, was born there, or perhaps taken there when very young; that when he first knew Ellen, Archie Pellard's mother, she moved into Bay Center about 35 or 40 years ago; that he has known Archie for that period of time; that Archie has been sometimes a fisherman, sometimes painting, sometimes boat building; that he is generally looked upon as an Indian of the aggregation of the remnants composed of the Indians in Willapah Bay and having affiliation quarters at Quinaielt; that he knew Archie Pellard's sister, Adelaide Lohre, recently deceased; that she lived at Bay Center for a good many years and then in British Columbia for a while, then at Bay Center again, and of recent years on the Quinaielt reservation; that Adelaide Lohre was allotted on the Quinaielt reservation;

That Archie Pellard was married to Tanina, the youngest daughter of Elizabeth Springer, the sister of Frank [518] Barichio; that she, Elizabeth Springer, was an Indian; that she was not allotted, having died some twenty odd years ago.

CLEVELAND JACKSON RECALLED AS WITNESS FOR PLAINTIFF.

CLEVELAND JACKSON, being sworn, testified that he is an Indian of the Quinaielt tribe; that he knows and had known Archie Pellard for 12 or 14 years; that he has always considered Archie Pellard an Indian, but does not know what degree of blood; that as nearly as he can say, Archie Pellard belongs to the Shoalwater Bay tribe or band; that when he first knew Archie Pellard he came to Taholah on the Quinaielt reservation, that was about 1914, fishing, building boats for Indian fishermen; that he managed the Indian baseball team in 1915, 1916, 1922 and 1923, the baseball team composed of Indian players from the Quinaielt reservation and some from Shoalwater Bay and some from Quileute; that the name of the team was the Taholah Indian Baseball Club; that Archie Pellard would play the oldtime fiddle at the dances any time they could get him to, he was just a fiddler, not a violin player, but not different from the ordinary fiddler, any Indians that happened to be there went to the dances he played at, but mostly Quinaielts; some held at the schoolhouse, some at the residences at Taholah; that he never saw Archie Pellard's mother and knows nothing of his ancestry; that he thinks he had a brother, knew his sister, Adeline Lohre, who was allotted on the Quinaielt reservation and some of Archie's nieces who lived on the Quinaielt reservation; that he himself has lived on the reservation; that he always considered Archie Pellard as anyone of Indian blood considers an Indian; [518-A] that outside any one of any degree of Indian blood is considered by the white

man as an Indian, and on the reservation he is considered a white man, if he has a small degree of white blood, just reverses the condition; as long as he has known Archie Pellard he has associated with the Indians; that he has never heard of Archie Pellard having an allotment on the reservation, and has heard no objection to him on the reservation.

TESTIMONY OF CLEVELAND JACKSON ON CROSS EXAMINATION.

That he never heard of any trouble Archie Pellard had on the reservation in 1917; that he considers an Indian any person with Indian blood; that most of them must have belonged to some tribe; that he just stated that as near as he can say, Archie Pellard belonged to Shoalwater Bay, because that is where he has known him to come from; that had Archie Pellard belonged to some other tribe he would have known it.

TESTIMONY OF CLEVELAND JACKSON ON REDIRECT EXAMINATION.

That he knows a full-blooded Indian named Humptulip Jimmy; that he lives on the Quinaielt reservation and as nearly as he knows, this man belongs part to the Upper Chehalis and Part Humptulip, that he talked what is known as the Upper Chehalis language and also what is known as Gray's Harbor; he is dead; that this Humptulip was considered a good fisherman and one of the best sea-otter hunters; that as regards the eating of salmon by the Indians on the Quinaielt there are salmon in the streams at all

times of the year, some kind of salmon, a complete cycle, sometimes more than others, five or six different kinds run in the river, when one lapses another runs in; that in [519] the old days the Indians lived on smelts, not necessarily from the ocean, silvers from the ocean, and Columbia River, or "candle-fish" from the mouth of the River and farther up; that he could not say as to any other streams in which the salmon run all the year round.

TESTIMONY OF HARRY SHALE FOR THE PLAINTIFFS.

HARRY SHALE, being sworn, testified that he is an Indian allotted and enrolled on the Quinaielt reservation; that he is well acquainted with Archie Pellard having known him since somewhere in 1914; has associated with him; does not know what degree Indian blood Archie Pellard is, but knows that he is mixed blood and he regards him as an Indian; that Archie Pellard has always associated with the Quinaielts; that taking the Court's given definition of "affiliate" as being from the word "Brother," he does not know that he can say that Archie is a brother; that as an Indian he has mixed in there and lived with the Indians off and on since the year he got acquainted with him; that he cannot say how the other Indians living on the Quinaielt reservation feel toward and treat him; that he and Archie Pellard have always treated each other like gentlemen.

TESTIMONY OF HARRY SHALE ON CROSS EXAMINATION.

That he cannot very well say he considers Archie Pellard a member of the Quinaielt tribe; that he takes him as a Bay Center man; fished with him a year or two, lived across where the witness lived; as to tribal membership, Archie Pellard told him he is from Bay Center; as to Archie Pellard's old people he knows nothing, being well acquainted with Archie Pellard only; that Archie Pellard has not grown up as a Quinaielt Indian or as a member of the Quinaielt [520] tribe of Indians;

That he (the witness) is one of the head men of the Quinaielt tribe and knows the men of that tribe; that as regards Archie Pellard growing up as a member of that tribe; he (the witness) never knew him until 1914; that Archie Pellard built a couple of boats for him and fished a couple of years with the Petit boys, and lived across from where he (the witness) is now living;

That perhaps Archie Pellard has been present at some of the tribal meetings recently, but does not know that he had any voice in the meetings, but has been present in different meetings; that Archie came from Shoalwater Bay; that he knows nothing of other tribes of Indians living around Shoalwater Bay as he is not familiar with the people around there.

Archie Pellard being stone deaf, Affidavit as to his testimony is submitted for use in Cases No. 320-E; 321-E; 306-E and 307-E.

By agreement of counsel, statement, with the exception of three lines, thereupon eliminated by

counsel for plaintiff, is offered in evidence and as Plaintiff's Exhibit No. 14, is admitted.

AFFIDAVIT OF ARCHIE PELLARD.

"That he is the plaintiff above named; that he is totally deaf and unable to hear or distinguish sounds; that he can read lips to a slight extent but not in a very reliable way and will be wholly unable to testify excepting in answer to written interrogatories which he can read and write the answers to;

That his mother was *Wllen* Pellard and she was a full blood Indian woman who was reared and lived all her life at Bay Center, Washington; that she died about 27 years ago, prior to any allotments upon the Quinaielt reservation; [521], that his mother had another child, Adeline Lohre, who died about a year ago and who was allotted upon the Quinaielt reservation, and that said Adeline Lohre had seven children all of whom were allotted on the Quinaielt reservation;

That all his life he has lived in the immediate neighborhood of the Pacific Ocean from the mouth of the Columbia River to the Quinaielt reservation; that all his life he has followed the occupation of a fisherman and still follows it; that in the year 1911 he removed to the Quinaielt reservation at Taholah and lived there for a number of years, making frequent trips to the fishing grounds in Gray's Harbor and Bay Center and other places along the Coast and returning to the Quinaielt reservation and fishing in the river there; that he has constantly associated and affiliated with the Indians on the Quinaielt reservation and is known to virtu-

ally all of them; for some years he was manager of the Quinaielt Indian baseball team composed of Indians on the Quinaielt reservation and as late as the year 1925 was manager of said team, and Robert Sampson, a full blood Quinaielt Indian allotted on the reservation was the treasurer of this organization;

That some years ago he was engaged in improving the fishing locations along the Quinaielt River driving stakes and piles into the river so that he and the other Quinaielt Indians could string their nets into the river for fishing therein; that this work was gratuitous and he never received any pay for it; that the lumber used was purchased from the Indians and the only funds he received were for the purpose of reimbursing him for the payment for the lumber and the actual expense in connection with the use of the pile driver;

That all his life he has constantly associated and affiliated with the Indians who now live on the Quinaielt [522] river who have come down to Bay Center and the various fisheries along the Pacific Coast and he has associated with them there and has fished with them at these places and also on the Quinaielt reservation. That to his knowledge no Indian of the Quinaielt reservation has ever questioned his right as a Quinaielt Indian, and all of them to whom he has talked have assured him that he is one of them and entitled to his rights on this reservation; that no Indian official of the Quinaielt reservation has ever denied him the right to go upon the reservation, to live there, or to use the fisheries of that place;

That he has never received an allotment of land upon any reservation or upon the public domain; that he has attended such tribal councils as have been held in recent years and has voted at such councils with the full approval and consent of the other Quinaielt Indians;

That he was married to an Indian woman named Tenino Barichio who is now deceased, she was the sister of Frank Barichio who is now living and is allotted upon the Quinaielt reservation. Her entire family were Quinaielt Indians and allotted upon the Quinaielt reservation; that his father was a Hudson Bay trapper and Voyager who came from Canada in the early days with the Hudson Bay Company. He was a French Canadian and he thinks had some Indian blood as most of these French Canadian Hudsons Bay men had.

His sister Adeline Lohre, a Quinaielt allottee, was married to a Quinaielt Indian who was allotted on the Quinaielt reservation. He had one brother named Henry Peers, now deceased, who was married to Julia Ducheney who died long ago but who was the sister of Agnes Elliott, also allotted on the Quinaielt reservation, as were all of her children.

The small tribe of Indians living on the Quinaielt [523] reservation, those living at Gray's Harbor, and those living at Shoalwater Bay, all speaking the same language, are all intermarried and interrelated and when he was a young man growing up in this county they would live part of the time on the Quinaielt reservation, part of the time on Gray's Harbor near Westport and part of the time at Shoalwater Bay where Bay Center and South Bend now

are. No distinction was drawn between the various tribes at that time, they were all one people."

Pellard case closed.

Reverting to Cases Nos. 320-E; 321-E.

TESTIMONY OF FRANK BARICHIO FOR PLAINTIFFS.

FRANK BARICHIO, being sworn, testified that he is past 60 or 65 years old and lives at Bay Center; that he is an Indian allotted on the Quinaielt reservation; that so far as he knows he was never adopted in the Quinaielt tribe; that he is married and has two children, Dewey and Mary Barichio, both plaintiffs in the action; that his daughter Mary is married to Paul Petit, an Indian; that Paul Petit's father and mother were Indians; that his son, Dewey Barichio, is married to an Indian, Lavina Wilson; that she is allotted on the Quinaielt reservation;

That his son Dewey and his wife, Lavina, have three children, Lamber, Leda and Romney; that the Petit's have two children, Norris and Ellis; that his (the witness) mother was a full blooded Indian allotted on the Quinaielt reservation; that his father was a white man;

Admitted by the Government that the families of the Barichios' and Petits' as outlined by L. L. Bush, in previous testimony, is correct, they are people of part Indian blood. [524]

TESTIMONY OF PAUL PETIT FOR PLAINTIFFS.

PAUL PETIT, being sworn, testified that he heard the testimony of L. L. Bush the day before as to the Petit family tree and relations, and that he agrees with him in that testimony.

TESTIMONY OF DEWEY BARICHIO FOR PLAINTIFFS.

DEWEY BARICHIO, being sworn, testified that the testimony as he heard it given by Mr. Bush regarding the Barichio family history is right.

TESTIMONY OF MARY BARICHIO PETIT FOR PLAINTIFFS.

MARY BARICHIO PETIT, being sworn, testified that she is not allotted on the reservation; that she is suing for allotment; that the testimony of Mr. Bush as he gave it regarding her family history is correct.

TESTIMONY OF LAVINA WILSON BARICHIO.

LAVINA WILSON BARICHIO, being sworn, testified that she agreed with what Mr. Bush said with reference to her family tree and relationship.

TESTIMONY OF FRANK BARICHIO FOR PLAINTIFFS.

FRANK BARICHIO, being sworn, testified that he has always lived down there as an Indian, as has his family; that he lives in Bay Center in an Indian

community; that some white people live around him, but it is the old accustomed place where Indians live; that he fishes for a living, but at present is keeping store; that Dewey Barichio and Paul Petit are fishermen; that he fished some in the Columbia River, but never went north of Shoalwater Bay; that quite a few Indians other than from Shoalwater Bay fish there, [525] Quinaielts and from different parts, quite a few the last summer; that some Indians from Shoalwater Bay go north to fish and he thinks some go to the Quinaielt reservation to fish; that fish and clams is the main diet of the Indians.

TESTIMONY OF FRANK BARICHIO ON CROSS EXAMINATION.

That he belongs to the Quinaielt Indians; that his father has always belonged to that tribe of Indians; that he was born in Wahkiakum County on the Columbia River; that his mother came from Shoalwater Bay and went down on the Columbia River; that he lived on the Columbia River for about 23 years; now lives at Bay Center; that there was no town where he lived on the Columbia in Wahkiakum County; he was born there and lived there 23 years; that while he was up there he was not then in any contact with the tribal organization; that he never attended any tribal meeting; that he never participated in any decision as to the business of the tribe; that now he is suing for some of his children who were born in Bay Center; that a couple of years ago they were on the Quinaielt reservation for a week and stayed at Taholah; that was the time he went up seeking information about his allotments;

does not remember but thinks they were there once before.

TESTIMONY OF PAUL PETIT FOR PLAINTIFFS.

PAUL PETIT, being sworn, testified that he is allotted on the Quinaielt reservation; that he lived on the reservation in 1915 and 1916 and was fishing in the Quinaielt River; had a fishing location there, on which he was given permission by Mr. Garber, the Indian Agent, to fish; that he had to clear it out as it was full of stumps and snags; the Indians on the reservation set nets; that Mary Barichio is his [526] wife and that she was on the Quinaielt reservation before they were married in 1915; that she stopped with Joe Brignone in 1915 while he was fishing at Quinaielt; that he played ball with them and worked for them on the Taholah Indians, which was the name of the baseball team as he knew it; that he cannot recall the name of the club; The Taholah Indians was all he ever heard them called; all on the team were Indians from around Taholah village; does not what other affiliation he has had with the Quinaielt Indians, has been there to fish, run in with boats several times; that fishing has been his occupation since 1913, boating and oystering, all his life; that there has been intermingling between the Indians on the north part of Gray's Harbor and the Indians in Bay Center in that each summer the seining crew on the Columbia River was attended mostly from the Indians of the North Quinaielt, Oakville and all along the Coast; that no Bay Center fishermen worked on the Columbia River; that mostly

the boys own their own boats and fish for themselves; that George Charley has been in there the last four or five years and from what his father told him that has been going on since he was a boy; that he knows George Charley, one of the witnesses.

TESTIMONY OF PAUL PETIT ON CROSS EXAMINATION.

That he was born at Bay Center and has lived there practically all his life; that Norris, his son, was born in Seattle, and the other at Bay Center; that Oscar Brignone was born in Bay Center; that he is bringing suit for Mary Petit and Norris and Ellis and Oscar Brignone; that he never lived on the reservation and the children have not been down except on a visit; that he has been at the council meetings on the Quinaielt reservation several times, once [527] in 1926, he had no voice in the meeting but went down with the boys, that was in 1926; he had no *vice* because he was a young fellow and the older people called the meeting; that he could not say what the meeting was for; that he is 37 years old; that in a way he has participated in the business of a meeting; that year or so ago at the request of Mr. Sams he acted as secretary temporarily for a meeting at South Bend.

TESTIMONY OF PAUL PETIT ON REDIRECT EXAMINATION.

That he never lived in Seattle; that his wife was here when his child was born and she remained two weeks and then they took him (the baby) home; that his mother lives in Seattle; that she went to his mar-

ried brother's home in Seattle at the time the child was born and remained two weeks and then returned to Bay Center.

TESTIMONY OF PAUL PETIT RECALLED—DIRECT EXAMINATION.

PAUL PETIT, being sworn, testified that he knows Oscar Brignone; that he is 12 or 13 years old; lives at Bay Center with his mother Tillie Reischman, who is related to Paul Petit's wife; that Oscar Brignone lives near him and his family; that he is an Indian.

Plaintiffs rest in Causes No. 306-E; 320-E and 321-E. [528]

Case of ROSE PICKERNOLL, MABEL PEERS WHITE and AMELIA PEERS ALDEN, Cause No. 307-E.

TESTIMONY OF MABLE PEERS WHITE FOR PLAINTIFFS.

MABLE PEERS WHITE, being sworn, testified that she is an Indian, sister of Rose Peers Pickernoll, and Amelia Peers Alden, co-plaintiffs with her in this cause; that Amelia Peers Alden lives in Dahlia, Washington, that she cannot come to Court as she is an invalid; that Mrs. Pickernoll is present; that her father was Henry Peers, an Indian; that he is dead; that her mother was Judith Ducheney, and she was an Indian, now dead; that her grandmother on her mother's side was Ellen Pellard, an Indian, a full-blooded Indian; that her grandmother on her father's side was Ellen Pellard; that her mother's

mother was Mary Ducheney, an Indian, and the mother of Agnes Elliott and the grandmother of the older Elliott men who were in Court, grandmother of William and Joe and those boys;

That Ellen Pellard had three children, her father, Henry Peers, Adeline Lohre, now dead and who was allotted on the Quinaielt reservation; and Archie Pellard, one of the plaintiffs in one of the cases just being tried; that he is her half-uncle; that she was born at Dahlia and now lives at Puyallup, Washington; lived in Dahlia 30 years; went to a Government Indian school in Oregon for a while; that her sister and brother and cousin, Joe Elliott and some nieces and nephews attended that school; (Did not give the name of the school in response to inquiry); that it was the nearest Government school, a boarding school which no one attended except Indians; they would not admit any but Indians to the school.

Adeline Lohre's children were allotted on the [529] Quinaielt reservation; they are her first cousins, the children of Adeline Lohre—Daisy Borg, Francis Payne, Marie Ross and Cora Walters, Eleanor Chenois and some others; that they live on the Quinaielt reservation; that she has visited them but not very often; that Adeline Lohre had prior to her death visited her quite often, they are her first cousins on her father's side, and the Elliotts are her cousins on her mother's side, Joe, William and Charles; that Agnes Elliott is her aunt and she was also allotted.

That she has since she can remember associated and affiliated with the people just above named and the other Indians of the Quinaielt reservation; that

she considers herself a member of the Quinaielt tribe; that she is now married to a white man.

TESTIMONY OF MABLE PEERS WHITE ON CROSS EXAMINATION.

MABLE PEERS WHITE testified that she has been married twice, both times to white men, and now lives at Puyallup and that it has been 10 or 12 years since she lived at Dahlia; that her people live at Dahlia and they are Quinaielt Indians, but mostly the Quinaielts living at Dahlia are composed of her people, that Dahlia is principally composed of members of her family and relations; that she never attended any tribal meetings of the Quinaielt Indians or any other tribe of Indians; that she was asked to go to Taholah to the meetings; that it was suggested that she attend the meetings by different members of the tribe, but she could not attend because she did not know when they were held.

TESTIMONY OF HENRY STRONG ON CROSS EXAMINATION.

That he knew Henry Peers and that he was an Indian; that he does not know where he came from; that he got [530] acquainted with him but Henry Peers was a great deal older than he; that he does not know if Henry Peers came from Canada, or British Columbia, that he is dead now and does not recall when he died, nor where, except up north somewhere, at a place he was fishing. (In response to the Court "by up north" he means "up toward Alaska."

TESTIMONY OF JOSEPHINE ELLIOTT FOR PLAINTIFFS.

JOSEPHINE ELLIOTT, being sworn, testified that she is an Indian, allotted on the Quinaielt reservation; that she knows Mable Peers White, Amelia Peers Alden, and Rose Peers Pickernoll, and has known them all her life; that they are Indians, and she supposes they belong to the Quinaielts, part Quinaielt; that she knew their father, Henry Peers, that he was an Indian; also their mother, who was an Indian; knew them at Dahlia and supposes they lived as Indians; that she has always known them and they have affiliated with Indians; that Rose Peers Pickernoll is married and lives at Dahlia; that Amelia Peers Alden lives at Dahlia; that she knew Ellen Pellard, who was a full-blooded Indian; that Ellen Pellard is the grandmother of these three Peers women; that their grandmothers on both mother's and father's side were Indians; that she knew Mary Ducheney, who claimed to be a Quinaielt;

That their father Henry Peers, had a brother Archie Pellard, and a sister, Adeline Lohre, that Adeline Lohre is her (the witness') mother, and she died last June; that Adeline Lohre is aunt to the three Peers women and that she lived at Taholah; that the Peers women, Rose Peers Pickernoll, Amelia Peers Alden and Mable Peers White associate with her and her husband, and they are both Indians, her husband being of the Quinaielt tribe; that she has known them intimately all her life and has always known them to associate [531] with the Indians.

Admitted by the Government that the testimony

of Joe Elliott will be the same as that of Josephine Elliott, next above;

Admitted that the family history of Rose Peers Pickernoll, would be given in testimony by herself, as given by two witnesses.

Plaintiffs rest in Cause No. 307-E.

CAUSE NO. 306-E, ARCHIE PELLARD.

TESTIMONY OF W. B. SAMS FOR DEFENDANT.

W. B. SAMS, being sworn, testified that he is the Indian Agent at Hoquiam; that he knows the plaintiff, Archie Pellard; that he has seen Archie Pellard around present during adoption meetings; that outside of the records he knows that Archie Pellard's sister, Adeline Lohre, came to him and wanted him to allow Archie to come back on the reservation.

TESTIMONY OF WILLIAM MASON FOR DEFENDANT.

WILLIAM MASON, being sworn, testified that he is the Chief of the Quinaielt tribe of Indians; that he knows Archie Pellard; that Archie Pellard is not a member of the Quinaielt tribe of Indians; that he is a Chinook and his mother was a Chinook; that he never saw Archie Pellard at any of the Quinaielt tribal councils.

TESTIMONY OF WILLIAM GARFIELD FOR DEFENDANT.

WILLIAM GARFIELD, being sworn, testified that he is one of the head men of the Quinaielt tribe of Indians, [532] that he knows Archie Pellard; does not consider him a member of the Quinaielt tribe, as

he is a Chinook; that he has not associated or affiliated with the Quinaielt tribe; does not know if he has ever been at any of the meetings; that he is a Chinook; that the people come and testify that they are Quinaielt Indians and he can get hundreds of witnesses from the Quinaielts and Quileutes and they will prove they know the Quinaielts, and that is the truth about it—that he has a copy of the Treaty in his house that does not mention "fish-eaters" but "bands of Indians" and that means Indians, not bands of white men—"you can tell when they are half breed or three quarter breed—furniture does not make a white man or make an Indian"; that it was Bay Center people who originally inhabited the Shoalwater Bay district; that of course they had a tribe, that was a way with Indians, Indians cannot go to other places, they were enemies; since the white people settled, that is the time the Indians travelled all over; that only the Chiefs bought girls from other tribes, not the common fellows, that is the way they live, on one place; that the Shoalwater Bay Indians have always lived there; that George Charley is their Chief; he is the Chief of the Bay Center people; that he is part Quinaielt on his mother's side; that sometimes the Chinooks went to the Shoalwater Bay and the Willapah Harbor tribe, but they are all dead, just a few Willapah Harbor Indians left, there used to be hundreds and hundreds when he was a boy.

On agreement of counsel, record is made to show that in all these cases being tried, prior to bringing the suits, all rules of the Department were complied with, with regard to furnishing to the Indian and Interior Departments and the

Allotting Agent, the necessary information as to [533] lineage and family trees. We supplied all the information we could and the whole facts were presented and every opportunity was given the Deparement to make these allotments without litigation.

On stipulation of counsel for plaintiffs and defendants, it is agreed that Chief Mason, Billy Garfield and Sampson Johns will testify to the same statement as the witness just preceding testified thereto, that they will deny that these persons in these cases involved in 321-E; 306-E; 307-E; 320-E, have affiliated with the Quinaielts and are not recognized as belonging to the Quinaielt tribe of Indians, deny association and affiliation with the Quinaielt tribe, even though allotted on the Quinaielt reservation. [534]

Case of MARY FRANCES PROVEO; LAURA M. BROWN; FRANK M. PROVEO; ROSA H. GARRARD; SARAH SPENCER; ISABELLE R. RAINEY; WILLIAM A. PROVOE; RAYMOND A. PROVEO. Docket No. 309-E.

TESTIMONY OF PIKE BENN, FOR THE PLAINTIFFS.

PIKE BENN, being sworn, testified that he is about 71 years of age and lives at Oakville, where he has lived all his life; that his father was Hotsu Benn and who died 25 years ago and told him when he died he was 115 years of age; that his father belonged to the Satsop tribe, one of the tribes of the Lower Chehalis; that he knows his father was present at the

meeting at Cosmopolis between Governor Stevens and the Indians of Southwestern Washington, for the purpose of negotiating a treaty with them; that his father told him he took Governor Stevens down the river to the council in 1855; that he is acquainted with the old Indians around Gray's Harbor and Quinaielt, and knows William Garfield, one of the headmen today of the Quinaielt reservation; that to him William Garfield is a young man; that William Garfield's father lived at Cosmopolis and his Boston name was John; that John belonged to the Gray's Harbor Indians and his wife belonged to the Quinaielts, the Gray's Harbor is sometimes called the Oyhoits, a branch of the Lower Chehalis.

That his (the witness) mother's name was Julia, a member of the Black River band of Indians; she died about 30 years ago in Cedarville in the Upper Chehalis Valley; that the Black River flows into the Chehalis at about Grand Mound; that he thinks his father had relatives among the Humptulips; that when he was young the Indians did not eat bread and sugar and coffee, but ate dried salmon. [535]

Q. Which is the principal article of diet, salmon?

A. Yes.

That they fished in the Chehalis River clear up to the Harbor; that their people went down to the Harbor to get fish and in the fall the salmon came up the river; that so long as he can remember, the Upper Chehalis tribe has fished at the mouth of the Chehalis River; that he has heard his father speak of fishing there before he can remember; that his father told him they used to get sturgeon and whale oil and once in a while catch sturgeon; that his father

used to sell beaver and other fur to the white men that came along the river and traded for furs; that in the early times his father said they caught mink and beaver and used the meat and dried the hide and treated it for the white people—the Englishmen from France; that he knows the Humptulips and thinks they just belong to the Humptulip tribe; he does not know about Taholah—that he knows every man in Taholah today.

That he knows Mary Francis Provoe, one of the plaintiffs; that she is not an Indian; that his mother came from Canada—the mother of the Provoe born on Cowlitz; that the father of Mary Francis Provoe was John Kindred, a white man; that her mother was Sallie, a full-blooded Indian from the Chehalis Black River to the Chehalis tribe; that Sallie's father was an Indian of the Black River tribe named KumKan; that Sallie's mother was Huckiwah, a full-blooded Indian from Black Creek next to Olympia, by the big lake; that Mary Francis Provoe is a half-breed Indian;

That Mary Francis Provoe married a man Provoe who came from Canada; he would not say but thinks he was part Indian, the husband of Mary was born at Cowlitz; that Mary Francis Provoe's mother had two children, one boy and one [536] girl, both dead; that one's name is Lafayette who has a claim at Taholah.

TESTIMONY OF PIKE BENN ON CROSS EXAMINATION.

That he knows the father of Mary Francis Provoe (the lady indicated to him); that he came from

Black Lake, belongs to Chehalis and is a full-blooded Indian, that her husband came from Canada; that there is no Nisqually blood in him—somebody dreamed that; that the Upper Chehalis live around Olympia, that now there are only white men there, all dead a long time ago, does not want to talk about the Nisqually Indians.

TESTIMONY OF PIKE BENN ON REDIRECT EXAMINATION.

That he thinks there are some Nisqually Indians down there, they used to be this side and they moved across the river and some of them are scattered around; that some Cowlitz *Indinas*—Upper Cowlitz live down at his own place and some are down at Mossy Rock, thinks there is a stream there and lots of Cowlitz people way up there.

TESTIMONY OF PIKE BENN ON RECROSS EXAMINATION.

That his father used to fish and sometimes catch some trout, but did not go to the woods to hunt; just went to the river and caught salmon, beaver, otter and mink, he used the fur to trade, we ate the beaver meat, ate them raw, caught the fish on the Chehalis River.

That he was born the year after his father went to the meeting at Cosmopolis with Governor Stephens; that all the Indians were called together, Cowlitz, Chinook, Bay Center, Quileute, Quinaielt and the Chehalis people went down there for three weeks and Governor Stephens told the [537] Indians that he would quit the meeting because all the Indians

did not sign the paper; that the Governor promised this Indian Chief if he signed the paper that they would have a big reservation in Taholah, Yakima—whichever way they wanted to go; that the Governor went home to Washington telling them he would send them a sawmill and a crush-mill that the Governor went home and I guess he sent them our mill down to old Tacoma; Well, now, Governor Stephens he went home and find a big war down there and got shot and didn't come home since that time he left Cosmopolis."

That he knew Sallie since he was a little fellow; that Sampson John's wife is Sallie's aunt; that Sallie died years ago—35 or 40 years ago; does not know where Sallie was born, that she lived at Rock River, Black River; that her husband's name was Dick; that he came from South Olympia; that he is a relative of Charlie Parsons; Charlie Parsons is from South Olympia, is a full-blooded Indian, and is Dick's uncle; that Dick was of the same tribe as he (the witness); that Dick has been dead a long time; that Dick was not a Frenchman, but a full-blooded Indian; that he does not know who Dick's father and mother were; that Dick was Old Sallie's second husband and they had no children; that Sallie's children were by her first husband and he does not know who they were; that he did not know her first husband, or who he was; that he had never seen him; that when he first knew old Sallie she had one girl and her husband had died and she married Dick afterwards; that her first husband was not a Frenchman but a full-blooded Indian; that he did not know him, but he saw his daughter Annie and she is a full-blooded

Indian and a full cousin to Amelia Sampson; testified repeatedly that Sallie had but one child, Annie, who died when she was about 30 and had no children. [538]

TESTIMONY OF PIKE BENN ON RE-RE-DIRECT EXAMINATION.

PIKE BENN testified that there was an old Indian named Kumkane and his wife Humquia and they had a daughter Sallie; that he was mistaken; that Sallie's sister was the mother of Annie; that Sallie was Mary Provoe's mother; that Sallie had another sister, Mrs. Konheep, of Sampson John's people, the daughter of Sampson's wife; that Klitumi was Annie's mother;

TESTIMONY OF PIKE BENN ON RE-RE-CROSS EXAMINATION.

That he is mistaken that Sallie had one child—there were three of them, Mrs. Provoe, a brother and a sister. Old Sallie was the mother of Mrs. Provoe; that Mrs. Provoe's father was John Kendall, a Boston man; that he is dead and does not know where he lived as the white man lives in a place a week and moves his camp and is hard to keep track of him; That Mrs. Provoe was born below Little Rock, Black River; that Mr. Provoe has some property down there and they live at Oakville; that Mrs. Provoe has lived in Oakville 15 or 16 years and before that lived at Black Creek, Little Rock;

That he knows Mary Provoe's family; that her husband was Dave Provoe and he died three or four years ago; that he came from the Victoria side, the French come from there—that his mother came from

Alaska, and the old man's father came from King George's side; that David Provoe said his mother was an Indian;

That he knows of the children of Mrs. Provoe by Dave Provoe, seven of them, one dead, one lives at Taholah, one Black Creek is named Dick Provoe, Bill and Frank Provoe at Oakville, one at Moclips, one blind fellow at Elma—all live [539] in the State of Washington; that he does not know anything about the Nisqually Indians nor about the Cowlitz Indians.

TESTIMONY OF MARY FRANCIS PROVOE FOR PLAINTIFFS.

MARY FRANCIS PROVOE, being sworn, testified that she is 74 years old, that she is a half-breed Indian; that she lives on the Chehalis reservation near Oakville and has lived there for 25 years; that she is the mother of all the plaintiffs in this case (cause No. 309-E); that one of the plaintiffs, John died two years ago;

That she belongs to the Chehalis Indians; that she was born at Tumwater, and lived at or near Little Rock before going to Oakville; that she has never lived on the Nisqually Indian reservation; that she was never there; that she has no relatives that were ever allotted on the Nisqually reservation; that is, not that she knows of; that she applied for allotment for herself and her children on the Quinaielt reservation; that she made the application but does not remember how long ago; that they went to Taholah approximately 12 years ago; that she and her husband and her daughter Mrs. Spencer, went to Taholah; that Mr. Johnson, the Indian Agent was

there; that he called all the Indians in; they all raised their hands to vote, every one of them; that Mr. Johnson wrote her a letter and asked her to come down to that meeting, he called it a council, and they went before the council of Taholah people, there were many there, does not know how many, but the room was large and was full of Indians; that they were the first ones presented before the council and Mr. Johnson told them if there was anyone to the contrary to put up their hands, and they all voted favorably for her; that they went down to Taholah, went down to see Mr. Johnson and he told them to [540] go down and have the Agent get the Indians together and see what they could do—does not remember the Agent's name; after that he said they changed the law and Mr. Johnson would have to be there and count the votes himself; he told us to go on that day and we went; that they appeared before the council to be recognized by the tribe, to be allotted land; that she represented her whole family; that her husband and daughter were with her.

Stipulated that the names of all the plaintiffs in Cause No. 309-E were voted upon or passed upon at that time.

That she was married to David Provoe and that she was married only once; that her husband, David Provoe, was born on Cowlitz Prairie; that he was a half-breed Indian; that his mother came from Stikine, Alaska; that her husband's father was a Frenchman who worked for the Hudson Bay people; that her husband was half Stikine and half French; that she

has a marriage certificate, but does not remember what year she was married to David Provoe.

Marriage certificate showing marriage of David Provoe and Mary Francis Provoe in Thurston County, January 24, 1870 exhibited in Court, and marriage conceded by defendant.

That David Provoe, her husband, was a member of the Cowlitz tribe of Indians, he was adopted into the tribe; that she was married only once and the plaintiffs named herein are their children; that she has three nieces allotted on the Quinaielt reservation —Mrs. Frank Gill, Mrs. Katie Thomas and Fannie— cannot remember her last name, it being French; that these allotments were made probably twelve years ago; that Lafayette died three days after he got his paper; that he was a full-blooded brother; that these allottees just named are nieces and nephews; that she does not know how Lafayette Kindred came to be adopted into the [541] Quinaielt tribe and to be allotted on that reservation; that she never received notice of any other or later council meeting at Taholah or the Quinaielt reservation which again passed upon her and her children; that she did not receive any communications from any official of the Indian Department at Taholah that she knows of, in 1918; that after the meeting was held, but she does not know how long after, they heard that another council meeting was held nine or ten years ago and they heard that their names had been withdrawn from or taken off the roll; that the decision of the council of 1912 had been done away with by a subsequent council; that they heard that five or six years ago and that

was the first time they heard of it; that until then, they thought they were on the Quinaielt reservation roll;

That in regard to her being from the Nisqually tribe, her mother was a full-blooded Indian born and raised at Tumwater; that her mother was never listed on or classified or lived on the Nisqually reservation; that she does not know whether or not she is listed on the Chehalis or the Quainelt census roll;

That beside some nieces and nephew and her brother, she has a first cousin allotted on the Quinaielt reservation and she is Sampson John's wife; that Sampson John's wife and her mother were sisters; that she has associated with her cousin some; that two or three times a year her cousin comes up and has dinner and stays overnight with them but she has not come this last year because she has been sick and before that she came once in a while; that they are on friendly terms and Mrs. Sampson John recognizes the witness as a relative and there has never been any question about that;

That she (the witness) does not know anything about [542] her ancestry back of her mother; that she does not know much of her grandparents except that they are from the Black River country, the Black River runs into the Chehalis River at Oakville; that her grandmother's name was Hoquin;

That her (the witness) mother's name was Sallie, a full-blooded Indian; that Annie was the daughter of her mother's sister whom they called Eliza; that Mrs. Sampson John's mother's name was Maria; that

she does not know whether Eliza and Klitumi are one and the same;

That she lives on the Chehalis reservation and that her neighbor there is Pike Benn, and the next one is Dave Benn; that there is one white family who bought a place and lives near them—that is Mrs. Sampson John's mother's place;

That neither she nor her children have ever been allotted land on the Chehalis reservation; that she does not know whether it was an Indian reservation at any time; that she does not know that they ever had a school there; they had an Indian school on the prairie for a while, but not at Oakville, a school where just Indians went to, it was near Peter Heck's place near Oakville; that her children were too old to go to school; they went to the public school at Little Rock; that she does not know if they had an Indian school there when she moved to Oakville, but they did afterwards.

TESTIMONY OF MARY FRANCIS PROVOE ON CROSS EXAMINATION.

That she thought she was recognized by the Quinaielts after she had attended the council meeting some 15 years ago; that she went for the purpose of being recognized, not adopted; that she had not been recognized by that tribe prior to that time; that she said she had been recognized before that time, but Mr. Johnson said it was necessary to go and have it done over again, so they went back then; [543]

That she does not know, and never heard them say whether the nieces and relatives that were allotted on

the Quinaielt reservation, were adopted into the Quinaielt tribe.

That her daughter Isabelle Ramey lives wherever she can get work and is living in town now; that she lived in Canada for some time a good while ago, until they burned out; that her husband was renting a farm and farming there;

That none of her family, or cousins, have received any money from the Nisqually tribe of Indians; that so far as she knows Mrs. Sampson Johns did not receive any money from the Nisqually tribe; that she does not know if any members of her family or relatives received any money from the Puyallup tribe of Indians; that she thinks it was in 1912 that she went to the Quinaielt reservation to that council meeting, it was while she lived at Little Rock; that now she believes she belongs to the Upper Chehalis Indians.

TESTIMONY OF W. B. SAMS RECALLED FOR PLAINTIFFS.

W. B. SAMS, being sworn, testified, that he knows William Garfield, a witness in several cases herein; that William Garfield claims his father was born at Cosmopolis but he is a Quinaielt Indian, of the Oiaht band, born and brought up to be a Quinaielt Indian;

That after checking up the census rolls of the Nisqually, Snokomish and other Indian tribes he does not think the Provoe family appears on any of the rolls—neither Chehalis or Nisqually; that he has never seen them if they are on the Nisqually roll;

That possibly the reason their names do not appear on any census roll is that they did not live on the reservation much; lived in Little Rock, outside of

the [544] reservation and would be what is termed "unattached Indians"; that as it does not show them to be in Oakville for some time, they would not be enrolled unless they were considered as members of that tribe; that these census rolls are prepared once a year; that the rule formerly was that where they had an employee, like during Johnson's administration, they report any changes; if any particular family was not on the list and was not living among the Indians, they would not be reported; sometimes people were put on who were not entitled to be put on, simply because they were living there and for that reason the rolls were sometimes inaccurate; some Indians are on two rolls for the reason they live for a while on one reservation, and then move to another reservation and are put on the roll there; that he has known of the Provoes since he has been Agent as they have been coming to see him occasionally to try to get themselves on the roll; that they were not put on the roll by him because he did not consider that they were entitled to go on the roll; because they lived in the villages and towns and he did not know that they lived among the Indians.

TESTIMONY OF W. B. SAMS ON CROSS EXAMINATION.

That in order to be on the census roll they have to be a member of the tribe and live with or close to it; that so far as he is advised these people did not live with any tribe; that in his jurisdiction he never found them in any reservation; that the roll now handed in by him is a separate census roll of the

Chehalis Indians that is made up each year, from 1905 up the present time; [545]

Census roll not admitted in evidence, but admitted by the plaintiffs that is shows, as previously testified by this witness, that a separate roll, census roll, was kept each year for the Chehalis tribe alone.

That this separate roll included only the Upper Chehalis tribe as that is the only one that is left.

TESTIMONY OF W. B. SAMS ON REDIRECT EXAMINATION.

That he has not gone over this census roll just above described, carefully; that he goes over it occasionally for the purpose of looking up something; that, as stated, this Upper Chehalis roll apparently starts in the year 1906 taken by Harry F. Listum, the Indian Agent, and presumably are brought down to the year 1927; that none of the names of the Halbert family appear on the Upper Chehalis roll.

Conceded by the plaintiffs and agreed to, that this roll above referred to, is the census roll kept of the Upper Chehalis tribe, kept as a separate and distinct tribe.

That there is no separate roll of the Lower Chehalis, that he simply enrolled the Lower Chehalis Indians with the Quinaielts.

TESTIMONY OF W. B. SAMS ON RECROSS EXAMINATION.

That the Indian Agency at Hoquiam, where he is, keeps census rolls of the Snoquamish tribe of Hood's Canal; the _____ tribe, an island tribe near

Olympia on an Island in the Sound; the Nisqually tribes near Camp Lewis on the Nisqually River; Chehalis tribe of the Chehalis reservation near Oakville, and the Quinaielt and Quileutes, a roll of the Quileutes also, a separate roll.

Stipulated and agreed to that this testimony with regard to the census rolls kept by the Hoquiam Agency, may be taken as to all the cases consolidated herein. [546]

That Hoquiam is the headquarters for transaction of business with the Indians; that he does not claim these census rolls are absolutely accurate.

That the reason the Agency for these Indians is placed at Hoquiam is that while the Agency was located at Taholah, on the Quinaielt reservation, so many Indians had business with the Agency, they complained of the location because of the inconvenience to them to come up to Taholah and travel the beach, and it seemed to be more central to be located at Hoquiam to take care of all the Indians under the jurisdiction of that Agency; that is, under the jurisdiction of the Hoquiam Agency are the Quinaielts, the Quileutes, the Nisqually, and all the other tribes mentioned by him, as distinct units; that they are administered through the Hoquiam Agency, he having been appointed to act for those different tribes and is in charge of each one; that there are Indians who come to Hoquiam to his Agency there to transact business, from all these various bands and tribes, and the Quinaielt tribe is but one of them.

TESTIMONY OF W. B. SAMS ON RE-RE-DIRECT EXAMINATION.

That referring to the name of Rose Elizabeth Cultee whose name appears on the last census roll of the Upper Chehalis tribe, so-called 1927—he knows her; that she is allotted on the reservation, her father is an allotted member; that George Comenot is allotted on the Quinaielt reservation; and Lena Heck is allotted on the Quinaielt reservation by adoption; that Ben Kaygor (with note that he carried on the Quinaielt roll as Wesley) is not allotted on the Quinaielt reservation;

(In response to the Court's question; these are people on the Chehalis roll allotted on the Quinaielt reservation). [547]

That John Longfred is allotted on the Quinaielt by adoption; that Gertrude Parsons was adopted; that Maggie and Lawrence Petit were adopted; that Sarah Sickman was allotted on the Quinaielt, and that Mamie Smith was adopted and Nellie Walker was adopted.

TESTIMONY OF W. B. SAMS ON RE-RECROSS EXAMINATION.

That two or three children's names, whose fathers were members of the Quinaielt tribe and married in the Chehalis tribe, and the babies enrolled, are only carried on that census roll as a matter of information, it states they were allotted on the Quinaielt reservation.

That as regards that roll, when there is a number opposite the name, they are presumed to be members

of the tribe; when no number is opposite the name, the name is merely put down for information, to keep a directory of it, that the numbered names follows a recognized name, and the unnumbered names are of the family of recognized names.

TESTIMONY OF RAYMOND A. PROVOE FOR THE PLAINTIFFS.

RAYMOND A. PROVOE, being sworn, testified that he lives at Oakville, Chehalis reservation; that he is the son of Mary Francis Provoe and one of the plaintiffs herein; that his sister Laura M. Brown, lives at Black Lake, about three miles from Tumwater; that Will Provoe lives at Elma; Frank, at Oakville; Rose E. Garrard, at Chehalis, and Isabelle R. Ramey, his sister, in Tacoma now; she lives wherever she works; that John Provoe lives at Shelton and Sarah Spencer at Moclips;

That he has had association and affiliation with the Indians at Taholah; has been down to see them, and has been on their farm and they have been invited down several times; [548] at one fourth of July they went down and stayed a week, his father used to play a violin for dances there; that it was 10 or 11 years ago that they stayed over the 4th of July; that different Indians invited them down, Clarence and John; that he has not been down there very often since then and never really stayed more than one night;

That he does not know anything of his ancestors; he "kinda" understood he belonged to the Chehalis tribe and supposes it would be the Upper Chehalis.

TESTIMONY OF RAYMOND A. PROVOE ON CROSS EXAMINATION.

That he could not say for sure that it was 1912 that he went to Taholah; that he did not go down to Taholah at the time his mother went there to the council meeting; that he has not exactly ever requested adoption in the Quinaielt tribe; that they have mixed up with the Quinaielt tribe and rather recognized as one, have relations on the Quinaielt reservation; that his cousins, Kate Thomas, Mrs. Ida Gill, and Mrs. Sampson are allotted on the Quinaielt;

That he was born at Tumwater, or near there; that they moved from Tumwater when he was quite young and moved to Little Rock where they lived until he was about 14 and then came back to the Chehalis reservation; that he could not tell what tribe of Indians is closest to Tumwater, or Olympia; that he does not know where the Nisqually band of Indians lived; that he never exactly knew anything of the Nisqually Indians; that he is not married, and does day labor.

TESTIMONY OF SARAH SPENCER FOR THE PLAINTIFFS.

SARAH SPENCER, being sworn, testified, that she is 47 years old, and lives at Moclips and has lived there for over 15 years; that Moclips is down on the other side of Hoquiam, [549] on the Taholah line; right on the line of the Taholah reservation; that she is the daughter of Mary Francis Provoe and one of the Plaintiffs in this case; and a sister to Laura Brown, John W., Frank M., William A., and Ray-

mond A. Provoe, and Rosa H. Garrard and Isabelle R. Ramey;

That they allege they belong to the Chehalis Indians; that she lived at Oakville for 8 years before going to Mocl[illegible]; that that is right on the line of the reservation; that she has friends on the Taholah reservation who come to see her and she goes to Taholah, to Marie Sampson and John and Charley Strong's folks; that she knows the Jackson family there; that they are friendly, their lots adjoin each other—Cleve Jackson and Anna Jackson and Cleve's mother too; that they call her an Indian—that she supposes she is Chehalis and Cowlitz—half degree.

TESTIMONY OF SARAH SPENCER ON CROSS EXAMINATION.

That she was born at Tumwater and could not say how many years she lived there, must have been 9 or 10 years, when they moved to Little Rock, which is not on a reservation; that they moved from Little Rock to Oakville; that she is married and has no children; that her husband is a white man who works in the logging camps.

TESTIMONY OF DAN SECENA FOR THE PLAINTIFFS.

DAN SECENA, being sworn, testified that he is past 70 years old and lives on the Chehalis reservation near Oakville; that he is a Siwash Indian; a full-blooded Indian; that the white men called them Upper Chehalis but they call themselves Satsops; that his father's name was Secena, an Upper Chehalis Indian and before the white settlers came and before

they had a reservation, they lived on Mountain Prairie; that they [550] called themselves Satsops, not Upper Chehalis; that his mother was Annie, half Satsop and half Humptulip, they are the Lower Chehalis tribe; that he does not know where his mother was born; that she died 16 years ago as an old woman, but could not tell her age, older than he is now; does not want to guess at her age when she died, but she was part Humptulip and part Satsop, her father being Satsop, that her father lived at the mouth of the Satsop where it empties into the Chehalis River;

That his mother's mother was Humptulip and lived on the Humptulip River most of her life;

That before the white people settled, their diet was salmon, deer, dry mackerel and beaver meat; that his people were fish eaters, and now the Upper Chehalis has the various runs of salmon the year round; that before the white people came and they learned about nets, they speared the fish, and still spear them, they fish in the river down to the Satsop where it is rather shallow;

That he knows William or Billy, Garfield, and has since he was a little fellow, knew his father, and does not remember ever seeing his grandfather; that before the reservation was started, the Garfields lived at Copalis, 9 miles south of Moclips, between Moclips and Oiahts, on or near the Quinaielt, on the north side of Gray's Harbor;

That he knows Mary Francis Provoe, who lives at Oakville, on the Chehalis River reservation; that he knows her father was a white man named John Kendall, and her mother an Indian named Huklea;

that Huklea's father was a Black River Indian, and so Huklea was a Black River Indian too; that he knows the name Sallie, and was mistaken—that it is Sallie who was Mrs. Provoe's mother, and Huklea was Sallie's mother, and Sallie's father was Old Kumkane, a [551] member of the Black River band, and Sallie was a full-blooded Indian, Sallie's daughter married a white man, Kindred, and they had a daughter, Mary Provoe.

Admitted by Defendant that his testimony as to the brothers and sisters of Mary Francis Provoe will be as that already given, admitted that this witness will testify that Mary Francis Provoe had a brother Lafayette Kindred, son of Sallie, a allotted on the Quinaielt reservation, and that Lafayetter had three children also allotted on the Quinaielt reservation.

TESTIMONY OF DAN SECENA ON CROSS EXAMINATION.

That he knows the Nisqually Indians well; that their homes were along both sides of the Nisqually River down at what is called Camp Lewis, they came from everywhere and have disbanded now;

That as far as they could spear the fish on the Chehalis was as far down as the Satsop—the Satsop is tidewater and there one cannot spear salmon; that they speared their fish; that the Chehalis Indians lived on deer meat; that deer was thick all over and no trick to kill them; they hunted and fished and were as good at one as the other, because there was plenty of fish and of deer in the old times; they did not have horses all the time, but later they had horses.

TESTIMONY OF DAN SECENA ON RE-DIRECT EXAMINATION.

That he does not know how the Lower Chehalis caught their fish; that since the white people came, the Indians all fish by nets and have been for quite a while.

Plaintiffs rest in 309-E. [552]

TESTIMONY OF CHARLES E. ROBLIN FOR DEFENDANT.

CHARLES E. ROBLIN, being sworn, testified that he is acquainted with the records at the Hoquiam Indian Agency; but that his investigation into the records has not been made to determine the original tribes from which the Indians came who were allotted on the Quinaielt reservation, but were checked by him very carefully, as to the authorized adoptions; and he is very familiar with that;

That as he remembers the counsel for plaintiff's earlier request, what was wanted by him, was documentary evidence for adoption and that he has it in Court with him;

That the documentary evidence shows that after he started his work as Allotting Agent on the Quinaielt reservation in April, 1925, he collected from the records in the Taholah reservation Agency at Hoquiam, all the letters of approvals of adoptions, or denials of adoptions in one file, and this is the file, taken from the official files of the Taholah Agency at Hoquiam, and that it contains the names asked about in the morning testimony. (Chehalis

Indians on the Chehalis census rolls, allotted on the Quinaielt reservation.)

That he does not think the names of Rose Elizabeth Cultee and George Comenot appear at all on the Chehalis roll as *member* of the Chehalis tribe, they have no numbers and are not put down as part of the Upper Chehalis tribe, not so carried on the Chehalis tribal records; (that even though it is submitted that their names are on the Upper Chehalis rolls, 'it is not in evidence'—by the Court).

Defendant's Exhibit No. A-4, census rolls of the various tribes of Indians as kept at the Quinaielt Agency, admitted in evidence. [553]

That the name of Lena Heck, wife of Peter Heck, appears on that census roll, with no explanation.

TESTIMONY OF CHARLES E. ROBLIN ON CROSS EXAMINATION.

That according to those records, Ben Kaygar was never adopted, his name is not on that roll as a member of the tribe; that if that is the Upper Chehalis roll, counsel is referring to, No. 29 before his name is the number by which it was carried on the preceding roll; that the numbers in the first column is the number always, on the preceding roll; the second column gives the current roll number, the third column the remarks, the fourth column the name; in the instance of Ben Kaygar, No. 29 appears in the first column, indicating it the number by which it was carried on the preceding roll, the second column being blank, indicates he is not carried as a member and is therefore not given a current number,

the third column "carried on the Quinaielt census as Wesley."

That the records show that John Longfred was adopted by the tribe, adoption approved August 30, 1909; Gertrude Parsons was adopted, adoption approved September 28, 1910, and there is a record of that; Lawrence and Blanche Petit adopted, adoption approved September 29, 1926; that the names of Nancy Beckwith Secena, or Nancy Beckwith is not on the record, nor that of Sarah Sickman; that Mamie and April Smith were adopted at the council meeting, June 26, 1925, adoption approved September 29, 1926; that the Indians of the Quinaielt reservation passed on those two; Nellie Walker has been adopted twice, under two names, in 1910, adoption approved September 28, 1910. [554]

TESTIMONY OF CHARLES E. ROBLIN ON DIRECT EXAMINATION.

That the name of Lafayette Kindred does not appear as an allottee on the Quinaielt reservation; that he was never allotted; that Mary Francis, Frank M. Provoe, Rosa H. Garrard, Isabelle R. Rainey and Raymond A. Provoe, were presented to the council twice; in April, 1912, they were presented the first time and the tribe took favorable action; that action was never approved by the Secretary of the Interior, and the same cases were referred to him (the witness) in September, 1916, with instructions to again present them to the tribe; at the meeting held on December 18, 19, and 20, 1918, they were presented and the tribe took unfavorable action, and he recommended that the applications be not approved, and

they were denied by the Secretary of the Interior on November 13, 1919.

Under his instructions it was his duty to make a study of the family history of this Provoe family and his investigation showed; that David Provoe, then living, made application to him (the witness) on behalf of himself, his wife, and children and several grandchildren, not now in Court, for allotment; that the best information he could get was that David Provoe's mother was a Stikine Indian, from the Stikine district of south Alaska and British Columbia, who had been brought into this country and tribally adopted under the old custom of the Cowlitz tribe, and amalgamated and became a member of the Cowlitz tribe; that David was born from a marriage contracted in Cowlitz country; and was always considered and recognized as a Cowlitz Indian; that the information given him at that time as to Mrs. Provoe's family history—Mary Francis Provoe's history, was that the belonged to the Nisqually tribe, and [555] that made the children, part Cowlitz by adoption, and part Nisqually; that his instructions were to report all the Indians in Western Washington that he found who had any claim against the Government and who were not enrolled at any Agency, and the name of the Provoe family was among the 3000 reported, and that he listed them as belonging to the Cowlitz; that he never found the names of the Provoe family on any rolls and he examined the rolls from all the agencies and subagencies in Washington;

That he has made allotments on other reservations than in this district; that as regards the policy of the

Government in dealing with individual Indians, or the tribes, would state that the policy has been to induce Indians to leave their tribal camps and assume habits and customs of civilized life, and one method was to segregate the tribal property and place it in the individual ownership of the members of the tribe, but it has always been recognized that the tribal property was the property of the tribe and the distribution of that tribal property was a pro-rata distribution of the tribal property to the individual members of the tribe; the largest allotment he ever made to any individual was 1046 acres, as a result of the policy explained.

TESTIMONY OF CHARLES E. ROBLIN ON CROSS EXAMINATION—CONTINUED.

That the members of the Provoe family did not receive any notice of the meeting of the council held in 1918 at which their names were stricken from the list of Indians.

Witness excused. [556]

THE COURT: Is it your position that before the approval of their adoption by the Secretary, they would be entitled to any notice or are you asking that as explanatory of their conduct?

MR. ELLIOTT: In 1912 they were approved by all the council and, apparently, that stayed intact until Mr. Roblin came down there and held another council and I asked him if they received notice so they could have an opportunity to come down there.

THE COURT: You are merely asking it as explanatory of the conduct and interest of the witness and not having legal effect?

MR. ELLIOTT: The legal significance, also, in 1912, the Indians were allowed to come before the council, appeared in person; in 1918 none of them were there—if any, a very few—the Indians struck them out; they did not have them before them—they had been voted on and recognized and adopted and in 1918, at the council held by Mr. Roblin, there were some people down at Taholah and I asked him if these people got any notice of that meeting.

THE COURT: If the approval of the Secretary is a prerequisite of an adoption, then the matter was just like a case in court that has not been concluded?

Mr. ELLIOTT: Probably that is true. They are people who needed adoption to get in.

THE COURT: In the former case, Chief Taholah testified certain proceedings were necessary for tribal recognition and he over and over again said they did not need to be adopted.

MR. ROWLAND: That is the point exactly. (Further argument) Your recollection of the Chief's testimony is consistent with ours. [557]

THE COURT: I am not saying he said everybody there did not need adoption, but he testified, as I recall, as regarding particular ones interested in the former suits or the ancestors of those interested in former suits that he said did not need adoption by members of the tribe. (Further argument.)

MR. ELLIOTT: In the subsequent meeting in 1918, I wanted to know if these people had notice of that?

TESTIMONY OF CHARLES E. ROBLIN ON REDIRECT EXAMINATION.

That he was very particular not to notify the members of the Provoe family of that meeting, because the council held in 1912 had been very severely criticized because of the manner in which it had been held, that being one of the reasons the Secretary of the Interior refused to approve it—it was a hurrah-hooray council attended by a great many people seeking adoption and a great deal of enthusiasm was engendered and the Indians of the Quinaielt reservation voted to take in 557 members, which was almost as many as were already enrolled. His instructions were to secure from members of the Quinaielt reservation, information as to whether or not they were entitled to adoption and enrollment; to carry that out, he spent nearly 20 months making investigations in Western Washington, traveling to every part of Western Washington district and interviewing Indians, securing affidavits and evidence from about 3000 of them, including the 557 who had been adopted in 1912; his instructions were then to present all that evidence to the Quinaielt council and get from the members of the council their opinion as to whether or not these people were entitled; consequntly his business was not with the applicants, but [558] with the Quinaielt reservation Indians, who were entitled to pass upon the application, and notice of the council meeting in 1918 was printed extensively detailing the business for which called, and posted to all members on the Quinaielt reservation rolls, but not to the applicants for adoption.

TESTIMONY OF CHARLES E. ROBLIN ON RECROSS EXAMINATION.

That aboue 750 Indians have been allotted on the Quinaielt reservation since 1912; that he considers 500 Indians recognized in one big council meeting would be a large number to so recognized.

THE COURT: I did not understand that it was a part of your instructions not to notify the petitioners or those asking for adoption but you thought that was the best way to do it?

THE WITNESS: Yes.

Q. Then, when this council was held, after they had passed on these names, these persons were not notified of that council?

THE COURT: You have said that twice.

A. I have no knowledge as to whether they were notified on the action taken by that council or not.

TESTIMONY OF WILLIAM MASON FOR THE DEFENDANT.

WILLIAM MASON, being sworn, testified that he is the Chief of the Quinaielt tribe of Indians; that the meeting of the tribes at which a large number of people were adopted, at Taholah, in 1912, was while his father was alive; that when the people came there asking for allotments it was the outsiders that raised their hands, not the original Quinaielts; that the Bay Center people promised [559] them that if there was anything going on at Quinaielt, they would be there and help, and this Elliott bunch, he did not say he was going to adopt the children—Elliott just said "just myself—you help me I don't want to put my children in." That Elliott said he didn't want his

children to because "too much white." That the reason he stated the last time he wanted the Elliotts to be members of the Quinaielt tribe was because they told him that they would not ask for their children and Elliott told Johnson that too, that he would not ask for his children to get in.

TESTIMONY OF WILLIAM MASON ON CROSS EXAMINATION

That Elliott did not ask to get his children in when he held up his hand for the Elliotts at a prior council of 1912; that of course, they voted for Driscoll, because Driscoll belonged to the Quinaielts, his mother and his grandfather were Quinaielts; that he cannot speak for the 1912 meeting because his father was there; his father was alive then and it was his father who acted on it at that meeting, (not the witness).

TESTIMONY OF WILLIAM MASON ON REDIRECT EXAMINATION.

That he does not consider these Provoe people who have been here and testified—Mary Francis Provoe and her children—members of the Quinaielt tribe, but members of the Cowlitz tribe.

TESTIMONY OF WILLIAM GARFIELD FOR THE DEFENDANT.

WILLIAM GARFIELD, being sworn, testified that his father lived all his life time in Taholah; that as he (witness' father) was the only man that could talk jargon Chinook, he was to do the talking for the whole tribes on [560] the Pacific; that the Indians all talked to John Garfield; that his grandfather was

born at Copalis and made his home in Copalis, and his real grandfather too, lived in Taholah; that he is placed as a Chief of the Quinaielts, with Waukeenas and Billy Mason; that Copalis, where his grandfather was born, was part of the land the Quinaielt Indians originally had which they gave away for the Quinaielt reservation. That the Upper Chehalis Indians fished with spears, they did not have nets in those days; that before the white people came the Lower Chehalis also used spears and hooks with long poles; and the Quinaielts fished that way; that is the difference between the way the Upper Chehalis fished and the Quinaielts, before the white people came. That the Upper Chehalis people did not fish on the ocean at all, but in the shallow places way up on the river;

That he does not know the Provoe family; never saw them before; supposes they belong to the Cowlitz tribe; that they have not been around with the Quinaielt reservation Indians;

As regards the baseball team of Taholah; that Archie Pellard says he ran; that that fact does not make him a Quinaielt Indian just because he is the boss of the team; Max Hudson ran the Taholah team a couple of times but that didn't make Max a Quinaielt; he is allotted there because he is a Quileute; the several men built for the Indians in Taholah, and the Cosmopolis team played baseball at Taholah, but that did not make them Quinaielts and the Taholah team went to Neah Bay, which is also all Indians, but that didn't make them Neah Bay Indians;

Q. Do you know whether there is a difference between the way people fished around Shoalwater Bay

and the way the Quinaielts fished down there? [561]

A. In the early days?

Q. Yes.

A. They use a hook, a long pole and feel around the harbor and hook the sturgeon.

Q. At Shoalwater Bay?

A. Yes, and the same way the Quinaielt. I used to fish that way, myself, with a long pole and I would fill a canoe in the night time.

TESTIMONY OF SAMPSON JOHNS FOR DEFENDANT.

Harry Shale sworn as interpreter.

SAMPSON JOHNS, being sworn, testified that his wife is a first cousin of Mrs. Provoe's mother; that his wife came from near Tumwater; that she was a half-breed Indian from some tribe that lived there; does not know the tribal name; that his wife has applied to the Puyallup tribe for money settlement, as she is related by blood to the Puyallup tribe; that he thinks his wife belongs to the Tumwater Indians.

TESTIMONY OF SAMPSON JOHNS FOR DEFENDANT ON CROSS EXAMINATION.

That Tumwater is about a mile and half above Olympia; that he does not know where the Deschutes River is; that his wife is one of the Allottees of the Quinaielt reservation through him by marriage and she is allotted there through marriage; that his wife has visited the Provoes at Oakville and he generally goes with her; that he sometimes stays over night; that

he considers them as his friends because they are his wife's cousins;

Admitted by Defendant that they are cousins.

[562]

That he considers them as Indians; that they live in Oakville not like Indians, but like citizens of the United States; that his wife weaves baskets, but he has never seen these women weave baskets; that sometimes they visit the Provoes as often as three times in one summer, and other summers, once; the longest he stayed was two nights in their home;

TESTIMONY OF SAMPSON JOHNS ON RE-DIRECT EXAMINATION.

That his wife was not adopted into the Quinaielt tribe;

That since he has been here as a witness he has heard the Elliott people say they are related by blood to the Quinaielts; that he would like to know where they got their information; that he is well acquainted with Mary Ducheney, the grandmother of the Elliotts, and from her own testimony she told him entirely different from what has been told in Court; that with his father and mother, they often made visits to Mrs. Ducheney's house and Mrs. Ducheney stated that she is related to a person by the name of Hotkos who was one of the leading people of the Lower Chehalis; that Mary Ducheney was a half-breed, half-Indian and half French and was then married to a man named Kelly, as Ducheney was dead; that Ducheney was her first husband.

TESTIMONY OF HARRY SHALE FOR DEFENDANT.

HARRY SHALE, being sworn, testified, that he does not know Mary Francis Provoe and her family; that he would not be safe in saying he has ever seen them before; that they are not members of nor associated with the Quinaielts; that they he does not know to what tribe they belong; that speaking of the Pete, Smith Hayden families—Maggie Smith—so often brought up at this trial, they are Chehalis. Her [563] father was John Smith, one of the leading men of the Chehalis tribe.

TESTIMONY OF HARRY SHALE ON CROSS EXAMINATION.

That the families just before mentioned are Upper Chehalis; that Maggie Smith's mother is first cousin to Chief Taholah, but she married over there; that before these young people could be recognized as members of the tribe, even though they are part blood Quinaielt, they had to go through a council meeting and they were adopted, and Maggie Smith's brother and his children, even though half Quinaielts were brought before the council and adopted before they had a right of allotment in that reservation; that John Hayden married a lady from Oakville, an Upper Chehalis, and Hayden's mother and people are Humptulips allotted on the Quinaielt reservation and that is how they are living there; and Nellie Walker, a sister, is also a Humptulip and related to the Quinaielts; John Hayden's mother and Nellie Walker were members of the Humptulips and related to the Quinaielt tribe; they are one of his close relatives.

There was considerable marriage between the Upper Chehalis and Quinaielt tribes.

TESTIMONY OF HARRY SHALE ON DIRECT EXAMINATION—Continuing

That he does not know that there is much difference in the methods of fishing between the Upper Chehalis and the Quinaielt tribes and the tribes of Gray's Harbor; that by tradition, the Upper Chehalis speared their fish, and fished with a sort of trap; that he saw that himself in the Black River; that there is a difference in the method of spearing in shallow and deep water, in deep water a pole 18 or 20 feet long, with a hook being used to feel around [564] for the fish and then hook them.

TESTIMONY OF HARRY SHALE ON CROSS EXAMINATION—Continuing.

That in fishing, the Quinaielts have traps for that purpose; nowadays the Upper River Indians coming to the bay shore, would have to fish with seines in deep water; that in going to the Upper River the Quinaielts would also have to spear, but they fish entirely different; when one learns to fish in the Quinaielt it is different than the process of fishing in the Upper Chehalis; they fish above high water; build a trap from one side to the other, put in posts every eight or ten feet apart and tie a pole about 3 or 4 inches in diameter to each one of the stakes; then they put two rows of that and take young growth of vine, maple, about a quarter inch in diameter and weave it together by cedar limbs about 16 inches wide to a section and sharpen the ends and

work that down to the ground from one side of the river to the other and then build a bed about six by twelve and place a trap or hook about 8 feet in diameter and in that way trap the fish; the Upper Chehalis used a little trap probably 12 feet long; we used that too.

TESTIMONY OF HARRY SHALE ON REDIRECT EXAMINATION.

That he does not believe the Upper Chehalis could fish on the ocean; they were born way up inland and his people were born out there on the ocean; that he, himself, went up as far as Bering Sea to use the spear and to spear fur seal; that he has helped to spear whale; that he believes it impossible for the inland Indian to spear a whale; The Upper Chehalis Indians are not considered coast Indians. [565]

TESTIMONY OF GEORGE CHARLEY FOR THE DEFENDANT.

GEORGE CHARLEY, being sworn, testified that he knows a little of the ancestry of Sampson Johns' wife; that she, is a half-breed; that this man Kumkane, they claimed in earlier testimony, that he was a Tumwater, but Tumwater is a little above Olympia and there is no such tribe that lived there; that the name Kumkane is of the Puyallup tribe; therefore, Mrs. Sampson Johns spoke the Puyallup language all together before she married Sampson Johns; that she is a Puyallup Indian; that the Upper Chehalis Indians never came below to fish on the Coast.

W. B. SAMS RECALLED BY PLAINTIFFS.

That the signature on the letter exhibited to him by counsel for the plaintiffs and said to be dated December 16, 1925, is the signature of Mr. Burke, Commissioner of Indian Affairs; that he, (the witness) received that letter as a part of his duties.

The letter in question was admitted with Defendants Exhibit No. A-14, being a part of that file.

That the file has the adoption papers in it and a great deal of other letters are filed in there that are not intended to be offered as evidence and that they are partly private.

Letter in question above then read, as follows:

"December 16, 1925, by Charles H. Burke, to William B. Sams, Agent, Taholah Agency, received at the Agency December 21, 1925, Taholah Indian School; on the stationery of the Department of the Interior; "Dear Mr. Sams: Receipt is acknowledged of your letter of November 19th, 1925, with reference to the rights of the children of Dick Jackson to enrollment with the Indians of the Quinaielt Reservation. [566] Comparison of your letter of November 19th with the previous report of November 2d, shows the report is not complete. However, as stated by you, the persons mentioned by Dick Jackson are his grandchildren, and all these children born subsequent to the mother's enrollment; you are authorized to place the names of Wilbur, Elizabeth and Isaac Jones on the tribal roll of the Quinaielt Indians, under Section 324, Indian regulations of 1904 and certify their names to the special allotting Agent for

allotments of land. Yours truly—:" (Witness continuing in testimony) the father was also adopted, *these* were afterwards born children and *place* on the roll; that he supposes the allotment instructions of 1904 are in the exhibits with the other case, and no objection being offered, they admit in evidence

Plaintiff's Exhibit No. 15, the adoption papers referred to, and the letter last above quoted to the Court, admitted in evidence.

All records in Defendant's Exhibit No. 14 and Plaintiff's Exhibit No. 15 submitted with understanding and agreement that before case is finally submitted some agreement may be reached toward copying the particular documents offered and admitted in evidence therein, that the files themselves may be returned to the Agency, being most important there.

TESTIMONY OF DAN SECENA, RECALLED AS A WITNESS IN REBUTTAL FOR THE PLAINTIFFS.

DAN SECENA, having been previously sworn, testified on direct examination, that the dividing line between the territory claimed by the Nisqually Indians and the Upper Chehalis tribes starts from three miles up the east side of the east side of the Chehalis town near Newaukin, cut across north, he doesn't know how many miles to the Shultz river and it is the line between the Chehalis and the Nisqually, [567] and it empties into the Tumwater. That the

old Indian from whom Mrs. Provoe descended lived on the Upper Chehalis side, up on Black River.

The Defendant herein prays that this, their Amended Proposed Statement of Evidence be settled, allowed and signed.

ANTHONY SAVAGE,
United States Attorney.

TOM DE WOLFE,
Assistant United States Attorney.

[Endorsed]: Lodged June 20, 1929.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 8, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [568]

United States District Court, Western District of Washington, Southern Division.

HILARY HALBERT, Jr., et al., No. 299-E,
RICHARD HALBERT, No. 300-E,
VERNON SIDNEY HALBERT, No. 301-E,
SIDNEY E. HALBERT, No. 302-E,
ARCHIE PELLARD, No. 306-E,
ROSA PEERS PICKERNOLL, et al., No. 307-E,
MARY FRANCIS PROVOE, et al., No. 309-E,
LULA M. ELLIOTT, et al., No. 312-E,
LIZZIE ROLFSON, et al., No. 314-E,
VIRGINIA WALKOWSKY, et al., No. 315-E,
MARY BARICHIO PETIT, et al., No. 320-E,
DEWEY BARICHIO, et al., No. 321-E,
EDNA MAY ELLIOTT, et al., No. 324-E,
CHARLES G. ELLIOTT, Jr., et al., No. 325-E,
AGNES RUBENS, et al., No. 326-E,

Plaintiffs.

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER APPROVING AMENDED STATEMENT OF EVIDENCE.

I, EDWARD E. CUSHMAN, Judge of the above entitled Court, and the Judge before whom the above entitled cases were tried, do hereby certify, the plaintiffs and the defendant having been represented by their respective counsel in open court, H. G. Rowland and Stuart A. Elliott for plaintiff and Thomas De Wolfe for defendant and they agreeing that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions pre-

sented by the appeal of the defendant from the judgments and decrees entered herein against the defendant, and in favor of the plaintiffs; and I do hereby approve and certify the same as the statement of the evidence in the said matter for the purpose of said appeal, [569] and do hereby order that the same become a part of the record for the purpose of said appeal, and order further that all the original exhibits be transmitted to the Appellate Court, the same to be listed in a separate order.

Done in open court this 8th day of July, 1929.

[Signed] EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: O. K.

H. G. & DIX H. ROWLAND,
STUART H. ELLIOTT,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 8, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [570]

United States District Court, Western District of Washington, Southern Division.

HILARY HALBERT, Jr., et al., No. 299-E,
RICHARD HALBERT, No. 300-E,
VERNON SIDNEY HALBERT, No. 301-E,
SIDNEY E. HALBERT, No. 302-E,
ARCHIE PELLARD, No. 306-E,
ROSA PEERS PICKERNOLL, et al., No. 307-E,
MARY FRANCIS PROVOE, et al., No. 309-E,
LULA M. ELLIOTT, et al., No. 312-E,
LIZZIE ROLFSON, et al., No. 314-E,
VIRGINIA WALKOWSKY, et al., No. 315-E,
MARY BARICHIO PETIT, et al., No. 320-E,
DEWEY BARICHIO, et al., No. 321-E,
EDNA MAY ELLIOTT, et al., No. 324-E,
CHARLES G. ELLIOTT, Jr., et al., No. 325-E,
AGNES RUBENS, et al., No. 326-E,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER.

Upon application of the plaintiff herein for an order listing the original exhibits to be transmitted by the clerk of the above entitled court to the Circuit Court of Appeals, both plaintiffs herein and defendant, having agreed herein upon said list of exhibits, and the Court being duly advised in the premises; NOW Therefore, it is hereby

ORDERED, that the following exhibits, to-wit:

Admitted for plaintiffs, numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15; and 10½.

Admitted for defendants, numbers A-1, A-2, A3 and A-4 in the above entitled action be, and they are hereby ordered to be transmitted by the Clerk of the above entitled Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, forthwith.

Done in open court this 8th day of July, 1929.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: O. K.

H. G. & DIX H. ROWLAND,
STUART H. ELLIOTT,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 8, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [571]

United States District Court, Western District of Washington, Southern Division.

HILARY HALBERT, Jr., et al., No. 299-E,
RICHARD HALBERT, No. 300-E,
VERNON SIDNEY HALBERT, No. 301-E,
SIDNEY E. HALBERT, No. 302-E,
ARCHIE PELLARD, No. 306-E,
ROSA PEERS PICKERNOLL, et al., No. 307-E,
MARY FRANCIS PROVOE, et al., No. 309-E,
LULA M. ELLIOTT, et al., No. 312-E,

LIZZIE ROLFSON, et al., No. 314-E,
VIRGINIA WALKOWSKY, et al., No. 315-E,
MARY BARICHIO PETIT, et al., No. 320-E,
DEWEY BARICHIO, et al., No. 321-E,
EDNA MAY ELLIOTT, et al., No. 324-E,
CHARLES G. ELLIOTT, Jr., et al., No. 325-E,
AGNES RUBENS, et al., No. 326-E,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

Upon motion of the defendant herein, it is hereby

ORDERED in the above entitled actions that the defendant may have up to and including the 23rd day of September, 1929, in which to file its record on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 8th day of July, 1929.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 8, 1929.

ED. M. LAKIN,
Clerk.
By E. Redmayne,
Deputy. [572]

United States District Court, Western District of Washington, Southern Division.

HILARY HALBERT, Jr., et al., No. 299-E,
RICHARD HALBERT, No. 300-E,
VERNON SIDNEY HALBERT, No. 301-E,
SIDNEY E. HALBERT, No. 302-E,
ARCHIE PELLARD, No. 306-E,
ROSA PEERS PICKERNOLL, et al., No. 307-E,
MARY FRANCIS PROVOE, et al., No. 309-E,
LULA M. ELLIOTT, et al., No. 312-E,
LIZZIE ROLFSON, et al., No. 314-E,
VIRGINIA WALKOWSKY, et al., No. 315-E,
MARY BARICHIO PETIT, et al., No. 320-E,
DEWEY BARICHIO, et al., No. 321-E,
EDNA MAY ELLIOTT, et al., No. 324-E,
CHARLES G. ELLIOTT, Jr., et al., No. 325-E,
AGNES RUBENS, et al., No. 326-E,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above Entitled Court:

YOU WILL PLEASE PREPARE Certified copy of transcript of record on appeal in the above entitled actions, making the same in one consolidated transcript, in accordance with the stipulation between counsel on file herein, and transmit said certified transcript of record on appeal to Paul P. O'Brien,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, forthwith, and include in said transcript the following:

1. Complaint in each case.
2. Answer in each case.
3. Reply, if any, in each case.
4. Decree in each case.
5. Memorandum Decision of the trial Court.
6. Amended statement of evidence as settled and approved by the Court. [573]
7. Petition for appeal in each case.
8. Order allowing appeal in each case.
9. Notice of appeal in each case.
10. Assignment of errors in each case.
11. Citation on appeal in each case.
12. The following exhibits which were admitted at the time of trial: For plaintiffs, numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, & 10½, the same being an extract from The Handbook of American Indians.

For defendants, numbers A-1, A-2, A3, and A-4.

13. Stipulation consolidating cases for purpose of appeal, and stipulating that one statement of evidence be sufficient.
14. All stipulations and orders extending time for filing record on appeal.
15. All stipulations and orders extending time for lodging or filing defendant's statement of evidence.
16. All of court's orders, either formal or by minute entry, continuing date for hearing on settlement of statement of evidence.
17. All orders extending term for purpose of settling and lodging statement of evidence.

18. This praecipe.

19. Order naming exhibits to be transmitted to Circuit Court of Appeals.

20. Order of July 8, 1929, extending time for filing record on appeal.

ANTHONY SAVAGE,
United States Attorney.

TOM DEWOLFE,
Assistant United States Attorney.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

JAMES T. RAHILY,
Associate Counsel.

OK

STUART H. ELLIOTT,
H. G. & DIX H. ROWLAND,
Attorneys for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 8, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy. [574]

District Court of the United States, Western District of Washington.

No. 312, 299, 300, 301, 302, 306, 307, 309, 314, 315, 320, 321, 324, 325 and 326-E.

SIXTEEN INDIAN ALLOTMENT CASES,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

To the Clerk of the Above-Entitled Court:

You will please issue certified copy of "Docket entry of May 20, 1929, showing lodgment of defendant's original proposed statement of evidence," to be added to Transcript of Record on Appeal.

TOM DEWOLFE,
Assistant United States Attorney.

[Endorsed]: Received a copy of the within praecipe this 26th day of July, 1929.

STUART H. ELLIOTT,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, *Northern* Division, Jul. 27, 1929.

ED. M. LAKIN,
Clerk.

By E. Redmayne,
Deputy [575]

In the United States District Court for the Western District of Washington, *Northern* Division.

No. 299, 300, 301, 302, 306, 307, 309, 312, 314, 315, 320, 321, 324, 325, 326-E.

HILARY HALBERT, Jr., et al., and fourteen other cases,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO CONSOLIDATED CAUSES ON APPEAL.

United States of America,
Western District of Washington—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 576, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled causes as is required by the praecipe of counsel, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause to wit: [576]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return 1517 folios at 15c	$227.55
Certificate of Clerk to Transcript of Record, with seal	.50
Certificate of Clerk to Original exhibits with seal	.50
Total	$228.55

I hereby certify that the above cost for preparing and certifying record, amounting to $228.55 will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the Quarter ending September 30, 1929.

I further certify that I hereto attach and herewith transmit the original citation issued in each of the respective causes.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 16th day of August, 1929.

[SEAL] ED. M. LAKIN,
Clerk, United States District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [577]

[Endorsed]: No. 5922. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Hilary Halbert, Jr., Dorothy Halbert Hubble, Mildred Halbert, a Minor, and Hilary H. Halbert, Guardian ad litem, Appellees, "and fourteen (14) other cases". Transcript of the Record. Upon Appeals from the United States District Court for the Western District of Washington, Southern Dvision.

Filed August 20, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.

No. 5922

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HILARY HALBERT, JR., DOROTHY HALBERT HUBBLE, MILDRED HALBERT, a Minor, and HILARY H. HALBERT, Guardian ad litem,

Appellees,

"AND FOURTEEN (14) OTHER CASES."

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

PROCEEDINGS HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated term, to wit, The October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the seventh day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Tom DeWolfe, Assistant United States Attorney, and by Mr. James T. Rahily, Attorney, Department of the Interior, counsel for the appellant, and by Messrs. H. G. Rowland and Stuart H. Elliott, counsel for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, The October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-fourth day of February,

in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF DECREES.

By direction of the Court, ORDERED that the typewritten opinions this day rendered by this court in the above cause be forthwith filed by the Clerk and that a decree be filed and recorded in each of the fifteen cases consolidated in above cause for hearing in accordance with the direction contained in said opinions.

United States Circuit Court of Appeals, Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

HILARY HALBERT, Jr., DOROTHY HALBERT HUBBLE, MILDRED HALBERT, a Minor, and HILARY H. HALBERT, Guardian Ad Litem,

Appellees,

AND ELEVEN (11) OTHER CASES.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—Plaintiffs in these cases invoked the jurisdiction of the District Court on the ground that they were entitled to an allotment of lands in the Quinaielt Indian Reservation in the State of Washington, and that this right had been denied by the Secretary of the Interior. Congress has authorized such an action in such a case. 25 U. S. C. A., § 345; 28 Stat. L. 305, § 1; 31 Stat. L. 760, § 1. Fifteen cases were consolidated for trial and on appeal, several of the cases, Indians whose claims were related, were joined, so that the number of allotments involved is greater than the

number of cases. Appellees base their right to allotment upon certain treaties and statutes to which we will now refer.

In 1855–1856 a treaty was signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, on behalf of the Government of the United States, and by certain head chiefs and sub chiefs of the Quinaielt and Quileute Tribes, and by a number of the Indians of these Tribes. In the caption of the treaty it is denominated an agreement and convention made and concluded between Isaac I. Stevens, Governor, etc., on the part of the United States, "and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them." Article 1 of the treaty provides that said tribes and bands cede their right to the lands and country occupied by them which is described in the article, and according to the statement in the opinion of the Solicitor of the Department of the Interior dealing with the subject is said to embrace an area extending one hundred miles along the Pacific Coast from Cape Flattery to Grays Harbor and extending inland from twenty to thirty miles, a total area of between two and three thousand square miles. Article 2 of the treaty provides that a tract or tracts of lands sufficient for their wants, within the Territory of Washington (which then included the present State of Oregon) should be selected by the President and set apart for their exclusive use; and provided that "the said

tribes and bands agreed to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant." Article 3 protected the Indians in the right of taking fish at the usual and accustomed grounds and stations in common with all citizens of the territory and of erecting temporary houses for the purpose of securing the same. Article 6 provided that the President might cause the land to be surveyed into lots and assigned to "such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable." (Senate Document Vol. 38, vol. 2, p. 719; 12 Stat. L. 971; Article 6 of the treaty with the Omahas (10 Stat. L. 1043), sec. 6, referred to in the foregoing treaty, provides in detail for the method of the allotment to single Indians and families and provides for forfeiture of the allotment in case the person or family to whom it is assigned should neglect or refuse to occupy and till or shall rove from place to place.

In 1887 Congress passed an act (24 Stat. 388, now 25 U. S. C. A., ch. 9, § 331 et seq.) providing for the allotment of lands by the President to indi-

vidual Indians located thereon. Section 1 thereof, now 25 U. S. C. A., § 331, provided:

> "In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such area as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian."

The section also contains the following proviso, "Provided further, that where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or act. * * * But in such cases allotments may be made in quantity as specified herein with the consent of the Indians expressed in such manner as the President in his discretion may require." It will be observed that this section requires that the tribe or band of Indians be located upon the reservation and that the individual Indian seeking allotment

be located thereon. As was said by Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, in Lemieux vs. United States, 15 Fed. (2d) 518, "No case has been cited, and we have been unable to find any which holds that a tribal Indian, living apart from the tribe and off the reservation, is entitled to an allotment under section 1 of the Act of 1887, and the language of that act seems to preclude such a holding." No one of the appellees resides upon the Quinaielt Reservation. This fact would justify and require the Secretary of the Interior to deny their applications for allotment under the general allotment law and would require a denial of their application by the District Court. Appellees, however, have based their claim upon a subsequent statute enacted by Congress March 4, 1911, with special reference to allotments upon the Quinaielt Indian Reservation. It is claimed that this statute applies to the appellees and obviates the necessity for residence. We will first consider whether or not this act obviates the necessity for residence upon the Reservation as a condition precedent to an allotment. This act is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette, or

other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute Tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservation set aside for these tribes: Provided, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

It is evident from the proviso above quoted that allotments were contemplated to be made to Indians who did not reside upon the Quinaielt Reservation, for it is provided that the allotments authorized by the act should be made from surplus lands "after the allotment to the Indians thereon have been completed." The appellees contend that this proviso altogether obviated the necessity for residence on the Quinaielt Indian Reservation. In order to determine the proper interpretation of this statute it will be necessary to consider certain facts disclosed by the record. Separate reservations had been set aside for the Hoh Indians, Quileute, the Ozettes and the Quits. The Hoh Indians were a band of Quinaielt Indians living near the mouth of the Hoh River on the west coast of Washington, having a population of sixty-two in 1905. The Quits, or Quaitso, or Quitz, were probably a part of the Quinaielt Tribe, living on the coast of Washington, north of the Quinaielts, numbering sixty-two

Indians in 1906. (See Hand Book of American Indians, Bureau of Ethnology, Bulletin 30, parts 1 and 2, published in 1910 by the Government under the description of "Quinaielt, Quileute, Quaitso and Hoh Indians.") On November 4, 1873, President Grant by Executive Order, set aside the Quinaielt Indian Reservation of three hundred fifty square miles, bounded on the west by the Pacific Ocean. That order, excluding the date and description of the reservation, is as follows:

> "In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast," etc.

Under the general allotment act the Indians to whom this reservation was made and who resided thereon were entitled to allotments therefrom. Under the same law Quileute Indians residing upon the Quileute Reservation, Hoh Indians residing upon the Hoh Reservation, Quit Indians residing

upon the Quit Reservation, were entitled to allotments from these reservations specially set apart for their use, but these reservations were so small that it would be impossible to give each Indian residing thereon the acreage authorized by the general allotment law. By moving from these small reservations to the Quinaielt Reservation the Indians for whom this reservation was established would be entitled to an allotment under the general allotment law. The Act of March 4, 1911, *supra*, however, provided that the Indians described in the act "who may elect to take allotments on the Quinaielt Reservations, rather than on the reservations set aside for these tribes, should have an allotment made to them on the Quinaielt Indian Reservation." These allotments the Secretary was directed to make "under the provisions of the allotment laws of the United States." It is a general rule of law that a party is put to his election only when he has two inconsistent rights. In view of this fact it must be apparent that the Indians who were by this act given a right of election as to whether they would take an allotment upon the special reservation set apart for them or from the larger reservation, must have had a right to selection upon the smaller reservation. In order to have a right to selection upon a smaller reservation it is necessary that the individual be located thereon. The right given to such an Indian by the Act of March 4, 1911, *supra*, was the right to select an allotment upon the larger reservation without the necessity of residence on that reservation. The effect of this legislation then

is to declare a residence upon one of these smaller reservations equivalent of residence on the larger reservation.

If there is any doubt as to the correctness of the foregoing construction of the statute it is set at rest by the report of the Congressional Committee on the act when it was reported to Congress for adoption. This committee report (61st Congress, 3d Session, 1910–1911, House Reports Vol. 2, Miscellaneous 11, Report No. 2152, reported February 11, 1911), incorporated and was based upon a letter from R. A. Ballinger, Secretary of the Interior, to the Chairman of Indian Affairs of the United States Senate, dated February 18, 1910. This report is as follows:

"Department of the Interior,

"Washington, February 18, 1910.

"Sir: I have the honor to acknowledge the receipt, by your reference of February 3, 1910, of Senate bill 5269, Sixty-first Congress, second session, authorizing allotments on the Quinaielt Indian Reservation, in Washington, to members of the Hoh, Quileute, and Ozette Tribes of Indians.

"By executive order of November 4, 1873, in pursuance of the treaty of July 1, 1855 (12 Stat. L., 971), there was set aside and reserved for the use of the Quinaielt, Quileute, Hoh, and other tribes of fish-eating Indians of Washington approximately 220,000 acres of land.

"Article II of the treaty of 1855, *supra*, provided that it would be lawful for the members of the several tribes to reside upon any land not in the actual claim and possession of citizens of the United States for a period of one year pending their removal to the diminished reservation. The diminished reservation was not established until 1873, and a number of the Indians who had not removed thereto at that time continued to live on tracts outside of the reservation even after it was established.

"To protect these Indians in their holdings off the reservation, executive orders of February 19, 1889, and April 12 and September 11, 1893, set aside and reserved approximately 1 square mile each for the Quileute, Ozette, and Hoh tribes respectively. These small reservations are and have been occupied by the Indians in the form of villages and do not contain enough lands to provide allotments for all the Indians thereon. Members of these tribes who moved to and resided continuously on the Quinaielt Reservation were entitled to and received allotments there.

"The department is of the opinion, therefore, that those members of the Hoh, Ozette, and Quileute tribes who are residing on the separate reservations set aside for them should receive allotments on the Quinaielt Reservation,

and would be glad to see Senate bill 5269 enacted into law.

"Very respectfully,

"R. A. BALLINGER, Secretary.

"Hon. MOSES E. CLAPP,

"Chairman Committee on Indian Affairs, United States Senate."

We conclude that under the general allotment laws only those individual Indians who were living upon the Quinaielt Indian Reservation are entitled to an allotment; that this law has been modified by the Act of Congress March 4, 1911, *supra*, in so far as the Indian tribes therein designated are concerned, by substituting residence upon the particular reservation set apart for the particular tribe, at the election of the Indian, for residence upon the Quinaielt Reservation. As the appellees do not reside upon any reservation this construction precludes the ordering of an allotment by the court, unless the statutes expressly applicable to Indians of mixed blood make an exception to the general rule. (25 U. S. C. A., §184.) We do not understand that the appellees rely upon this statute (25 U. S. C. A. § 184; 30 Stat. L. 90, § 1) as applicable to most of the applicants for the reason that they are not children of an Indian woman and a white man, but they are grandchildren, and therefore do not come within the provisions of the statute. (Pape vs. United States, 19 Fed. (2d) 219; Oakes vs. United States, 172 Fed. 305.)

We have not overlooked the contention that the applicants, notwithstanding their small proportion

of Indian blood, are alleged to be Indians and this allegation seems to be admitted. They base their claim upon the fact that they have been enrolled or acknowledged or recognized as Indians. We find it unnecessary to discuss further the rights of the appellees based upon their Indian blood or tribal relations because of the fact that in any event, not being located upon the reservation, they are not entitled to an allotment.

The judgments are reversed in the following cases in which the following named appellees were plaintiffs in the court below:

No. 299–E, Hilary Halbert, Jr., Dorothy Halbert Hubble, and Mildred Halbert, a Minor, by Hilary Houghton Halbert, guardian *ad litem;*

No. 300–E, Rich Halbert, a Minor, by Fred P. Halbert, guardian *ad litem;*

No. 301–E, Vernon Sidney Halbert, a Minor, by Benjamin F. Halbert, guardian *ad litem;*

No. 302–E, Sidney E. Halbert, a Minor, by Sidney Seth Halbert, guardian *ad litem;*

No. 307–E, Rose Peers Pickernoll and Mable Peers White, and Amelia Peers Alden;

No. 312–E, Lulu M. Elliott, Sophie M. Elliott, Carolyn M. Elliott, Marion E. Elliott, Emma S. Elliott, and Norma C. Elliott, Minors, by J. H. Elliott, guardian *ad litem;*

No. 320–E, Mary Barichio Petit, and Norris Petit, Ellis A. Petit, Oscar Brignone, Minors, by Paul Petit, guardian *ad litem;*

No. 321–E, Dewey Barichio, and Leda E. Barichio, Romie D. Barichio, Andrew B. Barichio,

Minors, by Vinie Wilson Barichio, guardian *ad litem;*

No. 324–E, Edna May Elliott, Ruth G. Elliott, William H. Elliott, John G. Elliott, and Frank L. Elliott and Jewell M. Elliott by William A. Elliott, guardian *ad litem;*

No. 325–E, Chas. G. Elliott, Jr., Anna Marie Elliott, Henry Elliott, Ralph G. Elliott, and Frances Elliott, Minors, by Chas. G. Elliott, guardian *ad litem;*

No. 326–E, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., and Christine Henry and June Henry, Minors, by Louise E. Henry, guardian *ad litem.*

Case No. 306–E, in which Archie Pellard was the plaintiff in the court below, is reversed with leave to amend complaint to show, if it be true, that the appellee is entitled to an allotment as a son of a recognized member of the Quinaielt Tribe and of a white man.

[Endorsed]: Opinion. Filed Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

VIRGINIA WALKOWSKY et al.,

Appellees.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—It is alleged that the plaintiffs are the children of Kate Walkowsky Weiss, who was a duly enrolled and allotted Indian of the Quinaielt Tribe of Indians; that the father of the children named Walkowsky was a white man named John Walkowsky, now deceased. The father of Edna Weiss, one of the appellees, was a white man named Robert Weiss, who married Kate Walkowsky after the death of her husband John Walkowsky.

Kate Walkowsky Weiss is an Indian woman born in 1874 on Shoalwater Bay on the Coast of Washington. Her mother was an Indian of the Wynooche band of the Lower Chehalis Indians, and her father was a full blooded Chinook Indian. Her tribal rights, however, would follow the father, a

Chinook Indian, rather than the mother, a Wynooche Indian. The right of Kate Walkowsky Weiss, the mother of the appellees, to an allotment, is not involved in this case as she has already been allotted lands on the Quinaielt Reservation. Eight of her children have also received allotments. These allotments to Kate Walkowsky Weiss and her eight children were based upon their adoption by the Quinaielt Indian Tribe. Three appellees, Virginia, Allen and Katherine Walkowsky, were born after the adoption of the mother by the Quinaielt Tribe and have not been adopted, but have been refused adoption by the tribe. The question then is as to their right to allotment upon the theory that their mother became a member of the Quinaielt Tribe by adoption, and that therefore they are children of a white man and an Indian woman recognized by the Quinaielt Indian Tribe, as required by 25 U. S. C. A., § 184. Appellees seem to be of the view that inasmuch as Kate Walkowsky Weiss was an Indian that she was an Indian by blood and not by adoption, within the meaning of the act in question. It is commented that the words "by blood" and not "by adoption" as used in the act have reference to the fact that a white person or a negro or a person of some race other than Indian might be adopted by an Indian Tribe and it is said that these persons would then be Indian by adoption although not such by blood, but where a woman is unquestionably of Indian blood, how, it is asked, can she become an Indian by adoption when as a matter of fact she is already

an Indian by blood? This contention overlooks the fact that we are dealing with the rights to tribal property and that an Indian woman who is not a member of the tribe is no more entitled to allotments on tribal lands than a white man or a negro. Plaintiffs have no right to an allotment under 25 U. S. C. A., § 184 as the children of a white man and an Indian woman recognized as a member of the Quinaielt Tribe; first, because she was not recognized as already a member of the tribe but was adopted into the tribe to make her a member. The children of an Indian woman, a member of a tribe by adoption, are expressly excluded from the allotment authorized by 25 U. S. C. A., § 184; second, she was not an "Indian woman" within the meaning of 25 U. S. C. A., § 184, but, in contradistinction, was herself a child of a white man and an Indian woman authorized as such, by that section, to participate in the tribal lands of her mother's tribe, the Chinooks. She took the status of the father, a white man, and it is only by reason of 25 U. S. C. A., § 184, *supra,* that she was entitled to participate in tribal lands of the mother's tribe, the Chinooks. Her right in the Quinaielt tribal lands was based, not upon her Indian blood, but upon an express adoption. She was not a member of the Quinaielt tribe by blood, but by adoption. The statute authorizing children of the half blood to participate in the tribal lands of the Indian mother, 25 U. S. C. A., § 184, *supra,* applies only to children of an Indian woman by blood and that means blood of the tribe whose lands are claimed by allotment

and not by adoption by that tribe. As was said in Pape vs. U. S., 19 Fed. (2d), 219, 220:

> " * * * That statute, although it conferred a right upon the children of an Indian woman whose condition brought her within the terms of the act, did not bestow such right upon children of marriages contracted after passage of the act, nor upon the children of a mother not recognized as one of the tribe at the time of her marriage or death. We find no authority to sustain the construction that, when an Indian woman married a white man after the act of 1897, and thereafter abandoned her tribal relations and adopted the customs and habits of civilized life, children born to her after such abandonment, who have never been recognized as members of the tribe to which the mother belonged, have the same rights as the mother would have had if she had been affiliated with the tribe at the time of her marriage." (See also Oakes vs. U. S., 172 Fed. 305.)

It is true that the mother did not become an Indian by adoption but she did become a member of the Quinaielt Tribe by adoption and therefore the right which she thereby secured was not extended to her children whose status otherwise was determined by her white father and not by that of the mother.

The decree is reversed.

[Endorsed]: Opinion. Filed Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

LIZZIE ROLFSON et al.,

Appellees.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—It is alleged that the plaintiffs and appellees are part Indian blood of the Quinaielt Indian Tribe residing in Grays Harbor County; that plaintiffs have always been recognized as such by the Quinaielt Indians, that they belong to the Lower Chehalis branch of the Quinaielt Tribe, that said plaintiffs belong to and are associated with and affiliated with the associated bands and tribes of fish-eating Indians of the Pacific Coast and Western Washington. The Court awarded the allotments prayed for and thus, in effect, found that the plaintiffs were Lower Chehalis Indians. It appears from the evidence that the appellee, Lizzie

Rolfson, was born in 1870 of white father, and a Chehalis—Upper or Lower—Indian mother, on her father's homestead; that in 1887 she married a white man named Smith and that two plaintiffs, Alvin Smith and Eugene Smith, are her sons by this marriage. In 1903 she married another white man, and in 1907, after his death, married a third husband, a white man. In 1918 she made an application to the Quinaielt Indians for enrollment, together with her children and grandchildren, on the ground that she was a member of the Chehalis Tribe of Indians and also made application for adoption by the tribe. The application for adoption was refused and the refusal was approved by the Secretary of the Interior.

The children of Lizzie Rolfson are American citizens and not entitled to an allotment as Indians unless they were adopted by the tribe. (See companion case No. 315–E, Walkowsky vs. U. S.) Recognition of the Indian blood of the children, no matter how made, would not be the equivalent of an adoption. We are of opinion that the grandchildren of an Indian woman married to a white man, even though their father may be a white man and their mother thus of part Indian blood, are not included within the purview of 25 U. S. C. A., § 184, and that their rights, if any, in the tribal property must be by reason of their adoption by the tribe.

This leaves for consideration only the question of Lizzie Rolfson, the mother. Her application for recognition and for adoption in the Quinaielt Indian Tribe was rejected. If however, her mother

was a Lower Chehalis Indian, recognized as such, as required by 25 U. S. C. A., § 184, Lizzie Rolfson, as her child, by her husband, a white man, would be entitled to an allotment, as it is stipulated that Lower Chehalis Indians are entitled to allotment upon the Quinaielt Reservation. Lizzie Rolfson's mother lived with her white husband upon his homestead at the time of the birth of Lizzie Rolfson. The appellant's position is that if Lizzie Rolfson's mother "had been tribally recognized 'by blood' at the time of her death, then her daughter, Lizzie Rolfson, of white paternity, would in such event, have had rights in the property of the tribe that had so extended its recognition to her mother under the act of June 17, 1897. * * * " (25 U. S. C. A., § 184.) This position is undoubtedly sound. It appears from the memorandum opinion that the trial court was of the opinion that Lizzie Rolfson's mother was recognized as a member of the Chehalis Indian Tribe previous to her death by reason of her residence among, and her accepted association with, these Indians. We are not disposed to disturb the conclusion of the trial court. The rights of her children, as is held in the Halbert case filed herewith, do not come within the purview of 25 U. S. C. A., § 184, and unless they have been formally adopted by one of the tribes entitled to an allotment upon the Quinaielt Indian reservation, would not be entitled to an allotment thereon, and even in the case of such an adoption it would be essential that they be resident thereon at the time of their application.

Decree reversed as to all the appellees except Lizzie Rolfson, and it is affirmed as to her.

[Endorsed]: Opinion. Filed Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY FRANCES PROVOE et al.,

Appellees.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—This is a companion case to the case of United States vs. Halbert, and was submitted at the same time and upon the same record as the other companion cases. The decree awarded allotments to all the plaintiffs and the Government appeals. It is alleged in the complaint that the plaintiffs are, and at all times since their birth, have been persons of part Indian blood, over twenty-one years of age and members of the Quinaielt Tribe of Indians residing in the State of

Washington. By way of recital it is further stated in the complaint that Mary Frances Provoe, being a member of an associated and affiliated band of Indians of the Quinaielt Tribe, and a fish-eating Indian of the Pacific Coast and of Western Washington, is the mother of the plaintiffs, other than herself, and that her husband, the father of the other plaintiffs is an Indian by blood, although his tribe is not stated. It is also alleged that in 1912 a tribal counsel of the Quinaielt Tribe of Indians, meeting at Taholoh, Washington, recognized plaintiffs as belonging to and being a part of the Quinaielt Tribe of Indians. It was further alleged that in 1912 the plaintiffs applied for an allotment which was refused on the ground that no provision had been made for the allotting of timber lands. Thereafter, plaintiffs selected certain lands described in the complaint. The Secretary of the Interior had "neglected, refused and declined to allot the said plaintiffs the identical allotments or any allotments of the land upon the Quinaielt Indian Reservation whatsoever. That said denial and refusal of plaintiffs' rights to allotment was for no reason known to plaintiffs, but that such refusal and denial is arbitrary and without reason, and in no manner justified, and is a denial of a right of said plaintiffs," etc. The answer admits that the plaintiffs are of part Indian blood but denies that they are of the Quinaielt or Quileute Tribes. It is denied that they were recognized by the Quinaielt Indian Tribe as members thereof, it is admitted that the Secretary of the Interior has refused to make an

allotment of lands to the plaintiff. The decree contains no findings of fact but a memorandum opinion of the Trial Judge is found in the record.

In the appellees' brief it is stated that the undisputed testimony is that appellees "are Chehalis-Cowlitz blood, the father, David Provoe, being born on Cowlitz Prairie and the mother, Mary Frances Provoe, on the Upper Chehalis River."

With reference to the residence of the plaintiffs, appellees state in their brief, as follows:

> "The facts are that Mary Frances Provoe and Raymond Provoe live upon the Chehalis Reservation, an Indian community among Indian neighbors; Frank Provoe at Oakville, Chehalis Reservation; Laura M. Brown at Black Lake about where she was born, an Indian community; William Provoe at Elma, the dividing line between the territory of the Upper and Lower Chehalis; Sarah Spencer at Moclips on the border of the Quinaielt Reservation among Quinaielt Indians in an Indian settlement."

Mary Frances Provoe testified that she thought she belonged to the Upper Chehalis Indians. The investigation of the allotting agent, C. E. Roblin, who testified in the case, led him to the conclusion that David Provoe, the husband of Mary Frances Provoe and father of the other plaintiffs, was an Indian whose mother was a Stikin Indian from the Stikin District from Southern Alaska; that his father was a white man; that he was brought to the

Cowlitz District and adopted by the Cowlitz Tribe; that he married Mary Frances Provoe, who was born at Tumwater, near Olympia, of a white father and an Indian mother. The tribe of her mother is in dispute; appellants claim that she was of the Nisqually tribe, and plaintiff testified that her mother was from the Black River country. It thus appears that the father of Mary Frances Provoe was a white man and that the father of her husband was also a white man.

It appears from the memorandum opinion that the Trial Judge reached the conclusion that Mary Frances Provoe's father was a white man and her mother a Chehalis Indian; that her husband's father was French and his mother a Stikin Indian of Alaska adopted by the Cowlitz Tribe; that Mary Frances Provoe by her marriage in 1870 to David Provoe, a Cowlitz Indian by adoption, took his status and by her marriage became a Cowlitz, and their children should be classed as Cowlitz; that whether classed as Upper Chehalis or Cowlitz the plaintiffs are entitled to an allotment. The only justification for the allegation that the appellees are Quinaielt Indians, is the claim that they were recognized as such by a tribal meeting held in 1912. At that meeting appellees made formal application for adoption. They were adopted by the Indians but this adoption was disapproved by the Secretary of the Interior and therefore had no effect. Mitchell vs. U. S., 22 F. (2) 771. The foregoing statement will indicate how far the evidence and the opinion of the Court depart from the

allegations of the complaint and that the trial court based its decree, as it appears from the opinion, upon the conclusion that the plaintiffs were Cowlitz Indians and not Quinaielt Indians, as alleged in the complaint. Plaintiffs do not allege that they are Cowlitz Indians and it does not appear from the record that the Secretary of the Interior was ever asked to make an allotment to the plaintiffs because they were Cowlitz Indians. The complaint should state the facts upon which the action of the Court is sought with particularity and it should appear therefrom that the claim to an allotment presented to the Court theretofore had been presented to the Secretary of the Interior and has been denied by him. The Court has no authority to consider the question of allotment unless and until it has been denied by the Secretary. It is only because of his alleged error in denying the application that the Court is authorized and required to act. It was certainly not contemplated by this remedial legislation that where a claim had been made to the Secretary of the Interior for an allotment and had been denied by him that the Court should be called upon to consider an entirely separate and distinct claim as a basis for an allotment. In the case at bar the Court should not be called upon to determine whether Cowlitz Indians are entitled to participate in the allotment of lands in the Quinaielt Indian Reservation where the Secretary of the Interior has denied a claim based upon the allegation that the petitioners are Quinaielt Indians. Apparently this case was tried

below without any objection to the evidence adduced by the appellees. Witnesses were permitted to express their opinion as to the intention of Congress in passing the act of March 4, 1911 (36 Stat. L. 1345), and their opinion concerning the interpretation of the executive order of November 4, 1873, and evidence was also adduced as to the meaning placed by Indians residing upon the Quinaielt Indian Reservation upon the clause of the act of Congress of March 4, 1911, relating to the tribes therein referred to as affiliated with the Quinaielt and Quileute Tribes in the treaty of 1855–1856. Because of this situation, and because such point is not made on appeal, we will ignore the variance between the proof and the pleadings otherwise than by calling attention to the difficulties confronting this Court where such lax practice is permitted. We cannot act here upon the rule which on appeal gives weight to the determination of the Trial Court upon evidence adduced before him and upon the opportunity of the Judge to determine the weight and value of the evidence in cases of conflict where the witnesses appear before him, for it is at once apparent that the evidence is wholly at variance with the allegation of the complaint, and with the implied finding of the truth thereof. We proceed to consider the question as to whether or not under the evidence the plaintiffs are entitled to an allotment.

As has been pointed out in the companion case, U. S. vs. Halbert, the act of March 4, 1911 (36 Stat. L. 1345), excuses residence upon the Quinaielt

Reservation and substitutes therefor residence upon a reservation set apart for the particular tribe, in the case of the Quileute, Hoh and Ozette, and other tribes affiliated with the Quinaielt and Quileute Indians in the treaty of 1855–56. In the case under consideration Mary Frances Provoe and some of her children are living upon the Chehalis Reservation. If the Cowlitz or Upper Chehalis Indians are covered by the act of March 4, 1911 (*supra*), which substitutes residence upon the tribal reservation for residence upon the Quinaielt Reservation, at the election of the Indian (Halbert vs. United States, companion case), then the residence of those plaintiffs and appellees upon the Chehalis Reservation would justify an allotment upon the Quinaielt Reservation. The question then is whether or not the Cowlitz or Upper Chehalis Indians were affiliated with the Quinaielt and Quileute Tribes in the treaty of 1855–56, within the meaning of the act of March 4, 1911, *supra*.

The interpretation suggested for this phase of the act of March 4, 1911, *supra*, by the appellant is as follows: "* * * it seems clear that the tribes who were 'affiliated' in the treaty were those who signed the treaty, and those who were supporters of the treaty signers, in the accomplishment of treaty making and, conversely, that those tribes or bands of Indians who declined to participate as principals in the treaty making, including their adherents, were not 'affiliated' with the Quinaielts and the Quileutes in the treaty of 1855–56."

Appellants claim that the Chehalis and Cowlitz Indians declined to enter into the treaty at all.

The position of the appellees is that all of the tribes at Cosmopolis, Washington, in 1855, who engaged in the negotiations leading up to the signing of the treaty, are affiliated in the treaty within the meaning of the act of March 4, 1911, *supra*. These tribes include the Upper and Lower Chehalis, Chinook, Cowlitz, Hoh and Quit Indians, whose representatives were there present. If, therefore, the presence of the Upper and Lower Chehalis tribal representatives at Cosmopolis, in 1855, and their participation in the negotiations for a treaty brought them within the purview of the act of Congress as affiliating in the treaty with the tribes that signed it, the residence of such appellees as resided upon the Chehalis Reservation, is substituted for residence upon the Quinaielt Reservation (Halbert vs. United States, *supra*). We will now consider that question.

By the act of March 4, 1911, the Secretary of the Interior was authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, "to all members of the Hoh, Quileute, Osette, or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute Tribes in the treaty of July 1, 1855, and January 23, 1856, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes, pro-

vided that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed." In view of the fact that the treaties referred to in this enactment were signed on the part of the Indians, by the head men and members of the Quinaielt and Quileute Tribes only it is obvious that the benefits of the enactment were not limited to these two tribes and that we must, if possible, place some construction upon the phrase, "or other tribes of Indians in Washington who are affiliated," etc. The general words "other tribes affiliated" in the statute are limited by the special words in the statute, naming particular tribes immediately proceeding the general phrase "other tribes," etc.; under the familiar rule of statutory construction of *ejusdem generis*, to other tribes related or affiliated, as the Hoh, Quileute and Ozette Tribes are, or were affiliated with the Quinaielt and Quileute Tribes (Hills vs. Joseph, 229 Fed. 865, 868, 869). The Hoh Indians were a band of Quileute Indians living at the mouth of the Hoh River, about fifteen miles suth of Lapush, the main seat of the tribe on the west coast of Washington. In 1905 they had a population of 62 (No. 1 Hand Book of American Indians, Bureau of Ethnology, p. 556, published in 1910). The Quits similarly were a subdivision of the Quinaielt Tribe. It would thus appear that the Quits were affiliated with the Quinaielt Indians in the same way that the Hoh Indians were affiliated with the Quileute Indians. That is to say, both the Hohs

and the Quits were tribes or bands of tribes signing the treaty and were by the terms of the treaty bound thereby. (See treaty quoted in Halbert vs. United States, *supra*, 12 Stat. L. 971.) The phrase in the statute, "other tribes affiliated," etc., is evidently applicable to the Quit Tribe and this fact gives sufficient meaning to the phrase to justify its use and satisfy its terms, even if there were no other tribe similarly affiliated with the Quinaielt and Quileute Tribes in the treaty and not specifically mentioned therein. The question then is, were the Upper Chehalis or Cowlitz Tribes affiliated with the Quinaielts and Quileutes in the treaty as the Hoh were affiliated. The condition and relation of the tribes at the time of the treaty was testified to by the witness Charles E. Roblin, special allotting agent of the Interior Department, as follows:

> "That the act of 1911 is the latest act having to do with the Quinaielt reservation as far as he knows; that from his best knowledge from a study of the Treaty, etc., the signators to the treaty of 1855–56 are the Chiefs, Headmen and delegates of the different bands and tribes of the Quinaielts and Quileute Indians in Western Washington; that in 1855–56 an agreement was reached (as previously testified) between representatives of the Government and of the tribes that met at Cosmopolis, but not signed, and later a few men of the tribe went somewhere and signed a paper purported to be a treaty; that without explanation that does not look so good; that the Chinooks, Cowlitz, Che-

halis, Quileutes and Quinaielts, Hohs and Queets were all at the meeting at Cosmopolis in 1855, and all associated in preliminary arrangements in making that Treaty; that history shows that the Chinooks, Cowlitz and Chehalis Indians refused to sign that treaty and that the treaty as finally drafted and signed was made at Olympia by the men whose names appear in this report of it; but that in Mr. Swan's book published in 1857, two years after the treaty, on page 345, an explanation of the failure of the Chinooks, Cowlitz and Chehalis Indians to sign that Treaty is given, being, briefly that they, the Chinooks, Cowlitz and Chehalis Indians, understood from the Governor that the reservation to be created for all parties would be located in the Quinaielt country, and they did not want to go there, because they were not friends, and if they (a Chinook leader speaking) went north among the other tribes they would fight and soon all be killed," and this same idea was expressed by all and repeated each day of the tribal council. So they tore up the treaty and refused to sign it. The statement as it appears on page 345 of Swan's report of that treaty in 'The Northwest Coast or Three Years' residence in Washington Territory' was an extract from the speech of one of the Chinook Chiefs and repeated by all."

If this is true it seems clear that as the Chinooks, Cowlitz and Chehalis Indians refused to sign the

treaty or be bound by its terms and particularly refused to live upon the reservation provided them in the treaty, that they cannot be said to be affiliated in the treaty in any true sense of the term "affiliated." Furthermore, the Cowlitz Tribe is defined in the Hand Book of American Indians, Vol. I, p. 355, House Documents, 59th Congress, 1st Session 61, as follows: "A Salish Tribe formerly on the river of the same name in s.w. Washington. Once numerous and powerful, they were said by Gibbs in 1953 to be insignificant, numbering with the Upper Chehalis, with whom they were mingled, not more than 165. About 1887 there were 127 on the Puyallup res., Wash. They are no longer known by this name, being evidently officially classed as Chehalis."

Moreover, it should be noted that there is no evidence as to what tribes were represented at the final meeting at Olympia, nearly six months after the Cosmopolis negotiations were had, other than the fact that the treaty was signed by the Quinaielt and Quileute Indians. If other tribes affiliated in the treaty at Cosmopolis by joining in the negotiations, they did not do so at Olympia. The meeting at Cosmopolis was to arrange a treaty for the cession of the lands of all the tribes there represented, extending as far south as the Columbia River, while the territory actually ceded in the treaty signed six months later at Olympia extended no further south than the ridge separating the Quinaielt and Chehalis River, which in the main did not cover the territory occupied by the Upper Chehalis, Chinook

and Cowlitz Tribes, and by that part of the Lower Chehalis Tribe around Grays Harbor, although it should be noted that the Solicitor General of the Interior Department referred to the division line as extending to Grays Harbor. (See statement quoted in Halbert vs. United States.) As we have indicated heretofore, those purporting to be bound by the terms of the treaty were the Quileute, Quinaielts and "tribes and bands" of these Indians which includes the Hohs and Quits and does not include the Chinooks, Chehalis or Cowlitz Indians which were independent tribes. In this connection it may be stated that the Department of the Interior had the allotting agent, Charles E. Roblin, call a meeting of the old members of the tribes to ascertain their understanding of what tribes were affiliated with the Quinaielts and Quileutes "in making the treaty" of 1855–56, *supra*. He testified with relation to that meeting as follows:

> "On December 12, 1919, he presided at such council with about 70 or 80 in attendance and quite a number of the old men told their recollection of what had been told them; this was all incorporated in a report to the Secretary of the Interior and eight or ten of the chief men of the tribe signed the statement; they stated the Indians affiliated with the Quinaielts and Quileute Indians in 1855 and 1856 Treaty were the Hohs, Queets and Humptulips, and specifically stated that the Chehalis Indians did not affiliate with them in making the treaty."

The Indians present were no doubt competent to give an opinion of the relationship of the Indian Tribes as a matter of pedigree but we do not wish to seem to subscribe to the doctrine that they were competent to interpret an act of Congress, because we consider their conclusions as to tribal relationships.

We conclude that the Chehalis Indians, both Upper and Lower, and the Cowlitz were not affiliated with the Quinaielt and Quileute Tribes in the treaty within the meaning of the Act of Congress of March 4, 1911, supra; that therefore, the residence of such of the plaintiffs in this case, as lived upon the Chehalis Reservation was not the equivalent of residence upon the Quinaielt Reservation, and that they are therefore not entitled to an allotment of land upon the Quinaielt Reservation as Indians of the Cowlitz or Chehalis Tribes, unless they reside thereon. We are not called upon to consider the case of a Humptulip Indian.

It remains to consider whether the plaintiffs in this case are entitled to an allotment in the Quinaielt Reservation which they may assert notwithstanding the fact that they neither live on the Quinaielt Indian Reservation or any other reservation set apart for a tribe affiliated in the treaty. The Indians for whom this reservation was set apart are designated in the executive order of November 4, 1873, as the Quinaielt, Quileute, Hoh, Quit and "other tribes of fish-eating Indians on the Pacific Coast" and in view of the phrase of the proclamation expressing a purpose "to provide for other In-

dians in that locality" the part of the Pacific Coast referred to is further limited to the locality.

Mary Frances Provoe is the daughter of a white man married to a Chehalis Indian (or Cowlitz). It was conceded by the Government in the court below that the Lower Chehalis Indians were entitled to allotments on the Quinaielt Indian Reservation. As we understand it this concession was made upon the theory that the Lower Chehalis Indians were fish-eating Indians on the Pacific Coast in that locality within the meaning of the order setting aside the reservation and thereby entitled to an allotment under the terms of the general allotment act. The Trial Court, in its memorandum opinion, declined to determine whether or not the mother of Mary Frances Provoe was an Upper or Lower Chehalis Indian upon the theory that in either event she was entitled to an allotment. As we have indidated, her right to an allotment under the general allotment law, as modified by 25 U. S. C. A., § 184, concerning the right of a child of an Indian mother and white father, which we think excuses residence in the reservation as a prerequisite to allotment in such cases, depends upon the question as to whether her mother was a recognized member of one of the tribes for which the Quinaielt Indian Reservation was set aside, and this depends in part upon the terms of the proclamation of November, 1873. While the evidence in the record would seem to indicate that Mary Frances Provoe was an Upper Chehalis, rather than a Lower Chehalis, Indian we feel that that question can be better determined by the

trial judge than by us, either upon the oral evidence already adduced before him or from such additional evidence as may be offered by the parties. For that reason we leave that question to be determined by the Trial Judge upon further proceedings not inconsistent with this opinion, nor do we wish to be understood as determining whether or not Upper Chehalis Indians are provided for by the proclamation.

It remains to now consider the rights of the appellees, who are children of Mary Frances Provoe, as a result of her marriage with David Provoe, by reason of their recognition by the Quinaielt Indians. They were not entitled to any interest in the tribal property by reason of their mother's Indian blood. Their rights, if any, are dependent upon the status of their father, who, it is claimed are adopted by the Cowlitz Indians although the son of a white man, or upon their own relation to the Quinaielt Indians. Mary Frances Provoe and the children, appellees, applied to a meeting of the Indians upon the Quinaielt Indian reservation for adoption. Their application was approved by the Indians in that meeting but this action was disapproved by the Secretary of the Interior. It is conceded that the consent or approval of the Secretary of the Interior is essential to a valid adoption (Mitchell vs. United States, 22 F. (2d) 771, *supra*); that assent having been withheld the adoption is ineffective for any purpose. Appellees, however, contend that the action of the Indian council, although futile as an adoption, was nevertheless

a recognition that they are Indians of the Quinaielt Tribe. This position cannot be sustained. If, in fact, they were not members of the Quinaielt Indian Tribe, the recognition of them, as such, could give them no rights unless that recognition amounted to an adoption. If we assume that they are members of the Cowlitz Indian Tribe, as the Trial Court held by reason of the adoption of their father by said tribe, they could not become members of the Quinaielt Tribe except by adoption by that tribe approved by the Secretary of the Interior. We find no basis on the record for an allotment on the Quinaielt Indian Reservation to the children of Mary Frances Provoe as Quinaielt Indians. If they have any just claim to an allotment not disclosed by the record, such claims should first be presented to the Secretary of the Interior, and if rejected by him may be presented to the District Court by petition, according to law. To permit such claims to be presented in the first instance the District Court, without presentation to and rejection by the Secretary of the Interior, would in the last analysis, throw a large part of the burden of the administration of Indian reservations upon the court rather than upon the executive officer charged therewith, and who, by reason of the long course of dealings with the Indian tribes, is familiar with the facts, and would be unauthorized by the legislation invoked as a basis for the jurisdiction of the District Court.

Decree reversed, and case remanded for further proceedings not inconsistent herewith.

[Endorsed]: Filed Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

HILARY HALBERT, Jr., DOROTHY HALBERT HUBBLE, MILDRED HALBERT, a Minor, and HILARY HALBERT, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeals from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

RICH HALBERT, a Minor, by FRED P. HALBERT, Guardian ad Litem,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,
Appellant,

vs.

VERNON SIDNEY HALBERT, a Minor, by BENJAMIN F. HALBERT, Guardian ad Litem,
Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY E. HALBERT, a Minor, by SIDNEY SETH HALBERT, Guardian ad Litem,
Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

ARCHIE PELLARD,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, and that this cause be and hereby is remanded to the said District Court with leave to amend complaint to show, if it be true, that the appellee is entitled to an allotment as a son of a recognized member of the Quinaielt tribe and of a white man.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE and AMELIA PEERS ALDEN,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

LULA M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, MARION E. ELLIOTT, EMMA S. ELLIOTT, and NORMA C. ELLIOTT, Minors, by J. H. ELLIOTT, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY BARICHIO PETIT, and NORRIS PETIT, ELLIS A. PETIT, OSCAR BRIGNONE, Minors, by PAUL PETIT, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

DEWEY BARICHIO and LEDA E. BARICHIO, ROMIE D. BARICHIO, ANDREW B. BARICHIO, Minors, by VINIE WILSON BARICHIO, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. ELLIOTT, JOHN G. ELLIOTT, and FRANK L. ELLIOTT and JEWELL M. ELLIOTT, by WILLIAM A. ELLIOTT, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

CHAS. G. ELLIOTT, Jr., ANNA MARIE ELLIOTT, HENRY ELLIOTT, RALPH G. ELLIOTT, and FRANCES ELLIOTT, Minors, by CHAS. G. ELLIOTT, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, CHRIS HENRY, Jr., and CHRISTINE HENRY and JUNE HENRY, Minors, by LOUISE E. HENRY,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY and EDNA WEISS, Minors, by KATE WALKOWSKY WEISS, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, JUANITA CHRISTOFFSON, and ROBERT ROLFSON, DONALD SMITH, VIVIAN FORDEN, Minors, by LIZZIE ROLFSON, Guardian ad Litem,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause as to all the appellees except Lizzie Rolfson be, and hereby is, reversed, and as to said appellee Lizzie Rolfson be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5922.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. PROVOE, JOHN W. PROVOE, ROSA H. GARRARD, SARAH SPENCER, ISABELLE R. RAINEY, WILLIAM A. PROVOE, and RAYMOND A. PROVOE,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

[Endorsed]: Decree. Filed and entered Feb. 24, 1930. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the thirty-first day of March, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK S. DIETRICH, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of all the appellees in the fifteen cases consolidated for hearing in above cause, excepting appellees Lizzie Rolfson and Archie Pellard, filed March 20, 1930, for a rehearing of above cause be, and hereby is, denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. H. G. Rowland, counsel for the appellees, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including May 31, 1930; and in the event the petition for a writ of certiorari to be made by the appellees herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANK S. DIETRICH,
United States Circuit Judge.

Dated: San Francisco, California, April 8, 1930.

[Endorsed]: Filed Apr. 8, 1930. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred and eighty-six (686) pages, numbered from and including 1 to and including 686, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 10th day of April, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 141

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 142

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 143

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 144

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 145

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 146

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 147

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 148

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 149

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 150

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 151

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 152

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 153

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 154

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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MAY 22 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1929.

FILE COPY

No.....

HILARY HALBERT, JR., DOROTHY HALBERT HUBBLE; MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem*; and FIFTY-ONE OTHERS, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION AND SUPPORTING BRIEF

OVERTON G. ELLIS,
A Member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington.

STUART H. ELLIOTT,
H. G. ROWLAND,
DIX H. ROWLAND,
Counsel for Petitioners,
Tacoma, Washington.

The Puyallup Valley Tribune

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No.....

HILARY HALBERT JR., DOROTHY HALBERT HUBBLE; MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem*, Petitioners; RICH HALBERT, a Minor, by Fred P. Halbert, Guardian *ad litem*, Petitioner; VERNON SIDNEY HALBERT, a minor, by Benjamin F. Halbert, Guardian *ad litem*, Petitioner; SIDNEY E. HALBERT, a Minor, by Sidney Seth Halbert, guardian *ad litem*, *Petitioner;* ROSE PEERS PICKERNOLL, MABLE PEERS WHITE, AMELIA PEERS ALDEN, Petitioners; MARY FRANCIS PROVOE, LAURA M. BROWN, JOHN W. PROVOE, FRANK M. PROVOE, ROSA H. GARRARD, SARAH SPENCER, ISABELLE R. RAINEY, WILLIAM A. PROVOE, RAYMOND A. PROVOE, Petitioners; LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, MARION E. ELLIOTT, EMMA S. ELLIOTT, NORMA C. ELLIOTT, Minors, by J. H. Elliott, Guardian *ad litem*, *Petitioners;* ALVIN SMITH and EUGENE SMITH, Minors, by Lizzie Rolfson, Guardian *ad litem*, Petitioners; VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, Minors, by Kate Walkowsky Weiss, Guardian *ad litem*, Petitioners; MARY BARICHIO PETIT; NORRIS PETIT, ELLIS A. PETIT and OSCAR BRIGNONE, Minors by Paul Petit, Guardian *ad litem*, Petitioners; DEWEY BARICHIO, LEDA E. BARICHIO; ROMIE D. BARICHIO and ANDREW B. BARICHIO, Minors, by Vinie Wilson Barichio, Guardian *ad litem*, Petitioners; EDNA MAY ELLIOTT; RUTH G. ELLIOTT; WILLIAM H. ELLIOTT; JOHN G. ELLIOTT, FRANK L. ELLIOTT, JEWELL M. ELLIOTT, Minors, by William A. Elliott, Guardian *ad litem*, Petitioners; CHARLES G. ELLIOTT, JR., ANNA MARIE ELLIOTT, HENRY ELLIOTT, RALPH G. ELLIOTT, FRANCES ELLIOTT, Minors, by Chas. G. Elliott, Guardian ad litem, Petitioners; AGNES RUBENS; LOUISE HENRY PETERSON; MARY HENRY HAGEN; CHRIS HENRY, JR.; CHRISTINE HENRY and JUNE HENRY, Minors, by Louise E. Henry, Guardian *ad litem*, Petitioners,

—vs.—

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The above named petitioners pray that writs of certiorari issue to review the decrees, fourteen in number, of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on February 24, 1930, (R. 633 to 699) reversing the decrees of the United States District Court for the Western District of Washington, Southern Division, and respectfully show:

OPINIONS OF COURTS BELOW

The opinion of the District Court is printed in the Record at pages 285 to 375, and is not reported in the Federal Reporter. The opinions of the Circuit Court of Appeals are printed in the Record at pages 633 to 699 and are as yet unreported.

CASES WHEREIN REVIEW IS HEREBY SOUGHT

Fifteen cases were consolidated for hearing and appeal (R. 685 and R. 376). In these fifteen cases fifteen decrees, all bearing the same number, 5922, were entered by the Circuit Court of Appeals (R. 633 to 685). In one of those cases, namely, that of *United States vs. Archie Pellard*, the decree (R. 674) was so far favorable to said Archie Pellard that no review of that decree is sought. The

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Emphasis ours wherever used.

Pellard case was No. 306-E in the District Court. In each of the remaining fourteen cases the decision of the Circuit Court of Appeals was in favor of the United States, except that in the case of Lizzie Rolfson *et al.* (R. 650, 653) the decision was in favor of Lizzie Rolfson but against her two sons, Alvin Smith and Eugene Smith. The two sons, but not Lizzie Rolfson, are included among the petitioners herein.

PRELIMINARY STATEMENT

The cases in which writs of review are sought were begun in the United States District Court for the Western District of Washington, Southern Division, under and by virtue of the Act of August 15, 1894 (28 Stat. L. 305) as amended by the Act of February 6, 1901 (31 Stat. L. 760) (25 U. S. C. A., par. 345), authorizing Indians to sue the United States and other parties in interest for allotments of land denied them by the Secretary of the Interior. The jurisdictional grounds are pleaded in each case. (R. 2, 20, 38, 56, 92, 109, 129, 150, 169, 190, 209, 227, 248 267). The reservation concerned is the Quinaielt Reservation in Grays Harbor County, Washington.

The cases were all consolidated for the purposes of trial and appeal. (R. 376).

After a hearing before the trial court, the petitioners above named were allotted and at the same time seven of the plaintiffs were denied allottments.

The respondent, the United States, appealed all the cases in which allotments were granted. The plaintiffs who were not allotted did not appeal. (Opinion of Trial Court, R. 285 to 375). The Circuit Court of Appeals granted the allotment of Lizzie Rolfson personally (R. 683) and of Archie Pellard conditionally (R. 674). The Circuit Court of Appeals reversed the United States District Court in the cases involving these petitioners. (R. 644). Petitioners filed a petition for rehearing, which on the 31st day of March, 1930, was denied. (R. 685).

All the petitioners are Indians.

Names, Residence and Family Relationship of Petitioners.

The first six petitioners in the first four cases above named are admitted to be children of duly enrolled and allotted Indian fathers of the Quinaielt Reservation. (R. 9, 27, 45, 63). The names of the first four petitioners were on the Quinaielt roll for several years and dropped without notice so far as the record discloses. (R. 395). These petitioners live at Hoquiam, Washington, where their fathers and grandmother, Quinaielt allottees, have always resided, with the exception of the petitioner Rich Halbert, who lives within 200 feet of the confines of the Quinaielt Reservation. (R. 398).

The petitioners, Lulu M. Elliott, Sophie M. Elliott, Carclyn M. Elliott, Marion E. Elliott, Em-

ma S. Elliott and Norma G. Elliott, are children of an Indian father and an Indian mother, both of whom are enrolled, recognized and allotted Quinaielt Indians, (R. 131, 136), were born and reared at Dahlia, Wahkiakum County, Washington; their father is a fisherman, and the respondent has recognized, enrolled and allotted on the Quinaielt Reservation the father, mother, grandmother, fifteen uncles and aunts, and numerous cousins. (R. 130, 137, 485, 490). What has been said about the last group applies to the appellees in cases 324 and 325 in the District Court, except that in these cases the petitioners are children of an Indian father and a white mother, the father being allotted on the Quinaielt Reservation. (R. 227, 248).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, are children of Louise E. Henry, who was enrolled and allotted on the Quinaielt Indian Reservation. They live where they have always lived. (R. 267, 273, 342, 490-491). This last group are children of a marriage between their Indian mother, Louise E. Henry, and a white man *contracted in* 1890. (R. 491).

The petitioners, Mary Barichio Petit, Norris A. Petit, Ellis A. Petit, are all offspring of an Indian father and Indian mother. Mary Barichio Petit is the daughter of Frank Barichio, an enrolled and allotted Quinaielt Indian, and Leda Givens, a

woman of part Indian blood. Norris A. and Ellis A. Petit are children of this Indian woman and Paul Petit, a recognized and allotted Quinaielt. Petitioner Oscar Brignone is a grandson of Ellen Amelia Springer, Quinaielt allottee No. 595. The petitioner Dewey Barichio is a full blood brother of Mary Barichio and the son of Frank Barichio. The wife of petitioner Dewey Barichio, and the mother of petitioners, Romie D., Leda E. and Andrew B. Barichio, is Vinie Wilson, duly enrolled and allotted on the Quinaielt Indian Reservation. (R. 550 to 553, 569-573).

The Barichio and Petit families live on Shoalwater Bay, Washington, with the colony of Quinaielt Indians there residing, virtually all the members of which were allotted on the Quinaielt Indian Reservation prior to 1908. (R. 493-495, 498). This family is of mixed Quinaielt and Lower Chehalis blood, (R. 550-553), and under the stipulation (R. 421), its members should be allotted.

The petitioners, Rose Peers Pickernoll, Mabel Peers White and Amelia Peers Alden, are the children of an Indian father, Henry Peers, a lower Chehalis Indian (R. 519), and an Indian mother, Judith Ducheney, (R. 93, 98, 99), a Quinaielt Indian, a sister of Agnes Elliott, allotted on the Quinaielt Indian Reservation. Petitioner Rose Peers Pickernoll is the wife of an allotted Quinaielt Indian. (R. 520).

The petitioners, Virginia, Alvin and Catherine Walkowsky, minors, are children of an Indian woman, Kate Walkowsky Weiss, a Quinaielt Indian, and a white man, John Walkowsky, whom she *married January* 9, 1893. The petitioners are full blood brother and sisters of Albert Walkowsky, Louise Walkowsky, Frank Walkowsky, Ida Walkowsky,Grace Walkowsky Griggs, Leonard Walkowsky, Rose Walkowsky and Kenneth Walkowsky, all of whom are duly enrolled and allotted upon the Quinaielt Indian Reservation. (R. 521, 522). Petitioners live with their mother, Kate Walkowsky, at Shoalwater Bay, Washington, among that branch of the Quinaielt tribe heretofore referred to. (R. 498, 521, 542). These petitioners are the offspring of a full blood Indian mother, either Quinaielt or a Lower Chehalis by blood, (R. 521, 542, 543, 546), and, under the stipulation at page 421 of the record, are entitled to be allotted.

The petitioners, Eugene Smith and Alvin Smith, are children of Lizzie Rolfson, allotted on the Quinaielt Reservation by the District Court and the Circuit Court of Appeals, (R. 683), the latter court affirming the District Court by finding her to be a Lower Chehalis Indian. The Circuit Court of Appeals follows the stipulation of the lower court agreeing that Lower Chehalis Indians are entitled to allottment. (R. 421). Eugene and Alvin Smith were born of a marriage of an Indian woman, Lizzie

Rolfson, and a white man, said *marriage* having been *solemnized* in the year *1887*. The petitioners were born, reared and lived most of their lives at Hoquiam, Washington, where their mother now livs. (R. 391 to 393, 472-476).

The petitioners, Mary Francis Provoe, Laura M. Brown, John W. Provoe, Frank M. Provoe, Rosa H. Garrard, Sarah Spencer, Isabelle R. Rainey, William A. Provoe and Raymond A. Provoe, are members of the Chehalis tribe of Indians of which the Quinaielt is a branch, and are all fish-eating Indians of the Pacific Coast, residing in Southwestern Washington in the vicinity of the Quinaielt Indian Reservation. (R. 586-590, 596-600). It should be noted that the expression, "fish-eating Indians" is used in the Executive Order of November 4, 1873, (Appendix "C" hereto). Mary Francis Provoe was married to an Indian, David Provoe, in 1870, who was the father of the above named petitioners. R. 587, 588). Petitioners were recognized as belonging to the Quinaielt tribe in 1912 by an unanimous vote of the Quinaielt council. (R. 586, 587).

Resume of History of Allotment of Quinaielt Reservation.

Allotments on the Quinaielt Indian Reservation in Washington began in 1905 under the General Allotment Act of 1887. The first roll of 119 names was submitted in 1907, the second of 327

names in 1908, and the third of 300 names in 1910. Thus, 746 Indians were allotted on the Quinaielt Reservation before the passage of the Act of March 4, 1911. (See Appendix "F"). (R. 437).

In 1908, the Superintendent of the Quinaielt Indian Reservation accompanied the Commissioner of Indian Affairs to the Quinaielt Reservation, and later, the Superintendent, Commissioner of Indian Affairs and the Secretary of the Interior, Mr. Garfield, held a conference in Washington when it was decided that, owing to the peculiar situation of the Quinaielt Reservation, the scattered fish-eating Indians in Southwestern Washington should be recognized and allotted without residence. (R. 499). Carrying out this policy, the Quinaielt and associated Indians living at Shoalwater Bay were allotted on the Quinaielt Reservation in 1906 or 1908 to the extent of over 100, without applications. Trust patents were issued to them and the Superintendent of the Quinaielt Reservation was sent to Shoalwater Bay to advise the Indians to accept their patents and to tell them that residence on the reservation would not be required of them. (R. 494). These Indians never resided on any reservation. Among these are included the entire settlement at Georgetown, sixty miles from the Quinaielt Reservation. (R. 425, 426).

Since the above schedules were approved, 746 or 747 additional Indians have been allotted and

such allotments approved by the Secretary. These allotments were made under the Act of March 4, 1911. Of all the names on these schedules, only six ever lived on their allotments. (R. 446). Of all the Indians allotted, only 200 live on the Reservation, these being at the fishing villages of Taholah and Queets. (R. 383). The allotting on the Quinaielt Reservation was discontinued after the filing of the schedule of 1910, as the Interior Department had decided that timber land was not allotable, and was not resumed until after the decision of this Court in the case of *Tommy Payne v. The United States*, in 1924, 284 Fed. 827, 264 U. S. 446. Allotment work was resumed in 1925 and this litigation ensued. Residence upon the Quinaielt Reservation or any reservation was not essential for allotment. (See Executive Order of 1873, Act of March 4, 1911, and Allotment Instructions in Appendix "C" "F" and "H"). The Quinaielt Reservation is a heavily timbered area. Residence thereon is not possible until the land is cleared and fit for cultivation. (R. 383, 404, 426, 500). As testified by Allotting Agent Roblin, the Act of 1887 did not require residence in order for an Indian to secure an allotment on a reservation. (R. 443). (Excerpt from Act of 1887 in Appendix "D").

The Quinaielt Indian Reservation, as originally surveyed and set apart, consisted of only 10,000 acres (R. 469). At the time of the treaty in 1855

and 1856 (see Treaty in Appendix "A"), the Quinaielt Indians numbered only 158. (R. 386). The reservation was enlarged by the Executive Order of November 4, 1873 (see Appendix "C"), to nearly 224,000 acres. (Bureau of American Ethnology, Handbook of American Indians, Part 2, Page 388, Executive Order of November 4, 1873, in Appendix "C," R. 436, 442 and 443). This Executive Order was promulgated under the terms of the treaty with the Quinaielts and other Indians giving the President of the United States the right to combine the Indians in the treaty with other friendly bands and tribes of Indians, (see Article 6 of Treaty in Appendix "A"), and "To provide for other Indians in that locality" and "other tribes of fish-eating Indians on the Pacific Coast." (See Executive Order of November 4, 1873, in Appendix "C").

The Executive Order referred to was promulgated because Congress had passed the Act of March 3, 1871, (R. S. 2079; see Appendix "B"), prohibiting further treaties with Indian tribes and declaring that they should no longer be recognized as independent nations and tribes.

All the petitioners come within the saving clause of the Act of June 7, 1897, (see Appendix "E"), or are the children of Indian fathers, or are the children of Indian fathers and Indian mothers.

The Act of March 4, 1911, specifically provides for the allotment of Indians who do not reside on the reservation. (See Appendix "F").

The Indians who have heretofore been allotted lands in severalty on the Quinaielt Reservation without the necessity of their being adopted into the Quinaielt tribe and without requiring residence on any reservation, are individual members of the following tribes and bands in that locality (Quinaielt Reservation) consisting of Quinaielt, Quileutes, Queets, Hohs, Upper Chehalis, Lower Chehalis, Chinooks and mixed bloods of the above named tribes and bands, all fish-eating Indians of the Pacific Coast of Washington. (R. 411, 412, 421, 426, 443, 445, 447, 448, 466, 576, 481, 493, 494, 495, 496, 498, 499, 500, 502, 503, 506, 526, 531, 534, 535, 551, 552, 553, 569).

It is agreed and stipulated that Lower Chehalis Indians are entitled to allotment on the Quinaielt Indian Reservation. (R. 421).

Findings of District Court Not Questioned by Circuit Court of Appeals.

The decisions of the Circuit Court of Appeals in these cases do not question the findings of the trial court as set forth in the memorandum decision of District Judge Cushman (R. 285) as to the family relationship or the tribal relationship of the petitioners nor do they, nor does the record, question

the enrollment, recognition and allotment of numerous members of the families of petitioners, nor do they question the findings of the District Judge as to the date of the several marriages of petitioners parents. The decisions of the Circuit Court of Appeals are based solely upon the questions of nonresidence on an Indian Reservation, the application of the Act of 1897 to the cases and the lack of tribal affiliation, and seem to carry the idea that the record does not show that petitionres exhausted their efforts with the Secretary of the Interior before suing for their allotments. (R. 669). The evidence in these cases and the express stipulation of the parties show that the petitioners did everything on their part to secure their rights before resorting to the Courts. (R. 527). Stipulation of Counsel (R. 528). Surely nothing unreasonable should be expected of these Indians in this respect, and the fact that respondent is opposing these allotments, on grounds denying their legal right to allotment, shows that no such technical contention has merit.

In closing this statement we will review the facts as disclosed by the records. Allotments on the Quinaielt Reservation began in 1905 (R. 437), when Honorable James R. Garfield was Secretary of the Interior. They were discontinued in 1910, (R. 437), by Honorable Richard A. Ballinger, the then Secretary of the Interior, on the ground that

the Quinaielt Indian Reservation, being timberland and unsuited to agriculture, was not the subject of allotment. In 1911 and 1912, when Honorable Walter L. Fisher was Secretary of the Interior, an allotting agent was again sent out and many of these petitioners did all possible to go upon the reservation and secure allotments. (R. 343). But no allotments were made during the administration of Secretaries of the Interior, Honorable Franklin B. Lane, Honorable John B. Payne, Honorable Albert B. Fall, and during this time the Department of the Interior sought to sell the timber (and as to a very large number of allotments, did sell it). The sale of the timber has had the practical effect of preventing any Indian from living on the allotments. Not until 1924, after this court had reversed the policy of the Department of the Interior in the case of *Payne vs. the United States*, 264 U. S. 446, was any effort made to allot. In 1925, when Honorable Hubert Work was Secretary of the Interior, allotment work was resumed. This was continued during the administrations of Honorable Ray O. West and the present Secretary of the Interior, Honorable Ray Lyman Wilbur.

The decision of the Circuit Court of Appeals does not pass upon the fact that these petitioners have never had an opportunity to live on any reservation, and that every complaint contains the following allegation:

"That, notwithstanding all of the facts hereinbefore alleged, the defendant, its officers and agents, have unlawfully failed, neglected and refused to allot the said land to the plaintiffs herein . . . . and have denied the excluded, and still deny and exclude plaintiffs herein from said land, and have refused and still refuse to let the said plaintiffs go upon or reside upon said lands or any portion thereof; that said plaintiffs are entitled to have said lands so selected allotted to them and desire that the same be allotted to them and that their rights be recognized and that they may be permitted to go upon, live upon, cultivate and improve said lands as their homes."

showing a willingness on the part of the petitioners to go on the reservation and make their homes as soon as the timber is removed and the reservation fit for occupancy. (R. 6, 10, 24, 25, 28, 42, 43, 46, 60, 61, 64, 96, 99, 114, 118, 133, 134, 137, 154, 155, 158, 173, 174, 177, 178, 194, 195, 198, 213, 214, 217, 231, 232, 236, 252, 253, 256, 270, 271, 274-275). The allegations just quoted, so far as concerns the facts stated, are in substance admitted by the answers, (R. 10, 28 etc.).

Nor does the Circuit Court of Appeals pass upon the fact that the Department has at all times told the Indians of Southwestern Washington that

they could continue to live off the reservation and would thereby in no way jeopardize their rights on the reservation given them by the Executive Order of November 4, 1873, and the Act of March 4, 1911. (R. 494-499). (Appendix "C" and "F").

IMPORTANT QUESTIONS PRESENTED

I.

IS A FISH-EATING INDIAN OF THE PACIFIC COAST, UNDER THE EXECUTIVE ORDER OF NOVEMBER 4, 1873, WHO DOES NOT RESIDE UPON ANY INDIAN RESERVATION, BUT LIVES IN THE ORIGINAL TRIBAL HABITAT OF HIS ANCESTORS, TO BE DENIED AN ALLOTMENT OF LAND ON THE QUINAIELT RESERVATION, WHEN THE QUINAIELT INDIAN RESERVATION WAS ENLARGED FROM 10,000 ACRES TO 224,000 ACRES EXPRESSLY TO PROVIDE FOR HIS USE AND ALLOTMENT, AND WHEN SUCH INDIAN HAS NEVER BEEN PERMITTED TO GO UPON OR RESIDE UPON THE QUINAIELT INDIAN RESERVATION?

The trial court found and the evidence sustains the finding that all of the petitioners were fish-eating Indians of the Pacific Coast and were qualified under this Order, and were either Quinaielt Indians by blood or members of the Lower Chehalis or Upper Chehalis, and in the case of the Provoe petitioners, that they were Cowlitz Indians. The District Judge who tried the case and whose opinion (R. 285-375) shows him to be a pro-

found student of Indian history of Southwestern Washington, took up each group separately and made findings in his decision that all these petitioners were fish-eating Indians of the Pacific Coast, identified with, associated and affiliated with, and intermarried with members of the Quinaielt tribe, being either descendants of one or both Quinaielt parents or descendants of Upper and Lower Chehalis or remnants of the Chinook band of Southwestern Washington.

The entire record sustains these findings, and they are not questioned by the respondent nor by the opinions of the Circuit Court of Appeals. (R. 386, 387, 390, 411, 421, 426, 427 and whole record).

The Handbook of American Indians, Volume 1, Page 272, states that in 1907 the Chinooks had completely fused with the Chehalis, so under the stipulation at page 421 of the Record, such of petitioners who are of Chinook ancestry would be entitled to allotment on the Quinaielt Indian Reservation.

The decision of the Circuit Court of Appeals makes no reference to the admitted allegations in the complaints hereinbefore quoted, which expressly state that all the petitioners have attempted to go upon and locate upon the Quinaielt Reservation, but have been denied such right, and excluded therefrom, and that they are willing to go upon the reservation and make their home thereon, as set forth

on page 15 of Preliminary Statement. That the reservation was enlarged from 10,000 to 224,000 acres is not disputed.

II.

SHOULD THE SAME RULE MAKING AN ACTUAL PRIOR RESIDENCE A REQUISITE FOR ALLOTMENT BE APPLIED TO A RESERVATION LIKE THE QUINAIELT RESERVATION, WHICH IS SO HEAVILY TIMBERED THAT RESIDENCE UPON IT IS IMPOSSIBLE UNTIL THE LAND IS CLEARED, AS IS APPLIED TO A RESERVATION WHERE THE LAND IS IMMEDIATELY SUITABLE FOR AGRICULTURE AND WHERE NO LARGE LAND CLEARING OPERATIONS ARE NECESSARY BEFORE HOMES CAN BE ESTABLISHED THEREON?

The entire record shows that the Quinaielt Indian Reservation is a heavily timbered area, and the Department of the Interior suspended allotments from the year 1910 to 1925. When allotments were resumed in the year 1925, 700 allotments were made, three-fourths of which were made to non-residents under the policy and regulations of the Secretary and other officers of the Department of the Interior who knew and realized the situation as set forth under this sub-head.

III.

SHOULD THE ACT OF MARCH 4, 1911, (see Appendix E), BE CONSTRUED AS DENYING ALLOTMENT TO INDIANS WHO, THOUGH OTHERWISE QUALIFIED TO

RECEIVE ALLOTMENTS, DO NOT RESIDE UPON THE QUINAIELT RESERVATION, WHEN THE EXECUTIVE ORDER OF NOVEMBER 4, 1873 (see Appendix C), PROVIDES "FOR OTHER INDIANS IN THAT LOCALITY," AND WHEN THE ACT OF MARCH 4, 1911, ITSELF PROVIDES FOR ALLOTMENTS "FROM SURPLUS LANDS ON THE QUINAIELT RESERVATION AFTER ALLOTMENTS TO INDIANS THEREON HAVE BEEN COMPLETED?"

It is admitted that the petitioners are descendants of Quinaielt Indians or are fish-eating Indians of "that locality," intermarried and affiliated with the Quinaielts, residing immediately south of the border of the Quinaielt Reservation in the country of the Lower Chehalis tribe extending from the south boundary of the Quinaielt Indian Reservation to the southerly end of Shoalwater Bay.

It is further admitted that all the Indians on the reservation have been allotted, and that petitioners are claiming their allotments from the surplus allottable lands, Allotting Agent Roblin testifying that there are approximately 195,000 acres of allotable land, sufficient to allot 2,200 Indians (R. 442, 443), and that only 1,414 Indians have been allotted on the Quinaielt Reservation. (R. 437, 449, 466).

The Executive Order of November 4, 1873, and the Act of March 4, 1911 (see Appendices "C" and "F"), clearly indicate the intention that In-

dians other than those who live upon the Quinaielt Reservation or upon any Indian Reservation, shall be entitled to the benefits of the act.

IV.

SHOULD THE ACT OF JUNE 7, 1897, (see Appendix E), BE CONSTRUED AS DENYING ALLOTMENTS TO CHILDREN OF A MARRIAGE OF AN INDIAN WOMAN AND A WHITE MAN WHICH WAS SOLEMNIZED PRIOR TO THE PASSAGE OF THE ACT, OR TO CHILDREN OF AN INDIAN FATHER, OR TO CHILDREN OF AN INDIAN FATHER AND AN INDIAN MOTHER, WHERE THESE CHILDREN (PETITIONERS HEREIN), WHOSE PARENTS (ONE OR BOTH) ARE RECOGNIZED AND ALLOTTED QUINAIELT INDIANS, WERE BORN, REARED AND NOW LIVE IN THEIR ANCIENT TRIBAL HABITAT?

The petitioners, Virginia, Alvin and Catherine Walkowsky, are the children of Kate Walkowsky Weiss, a duly enrolled and allotted Quinaielt Indian. *Kate Walkowsky Weiss was married to a white man January* 9, 1893, (R. 521), and the petitioners are children of that marriage. (R. 522). Eight other of her children were allotted. (R. 522). The entire family, including the petitioners, were all born, reared and have always lived at Shoalwater Bay in Southwestern Washington. (R. 542). Kate Walkowsky Weiss, though duly enrolled and allotted, neved lived upon the Quinaielt Reservation. (R. 543).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, are all the children of an Indian woman, Louise E. Henry, and a white man, who were married in the year 1890. (R. 491).

Louise E. Henry, the mother of the above petitioners, is a duly enrolled and allotted Indian of the Quinaielt Reservation. (R. 267-268, 273, 342).

Louise E. Henry and the above named petitioners have always lived at Dahlia, in Southwestern Washington, and now reside at said place; and Louise E. Henry was living at said place when she was enrolled and allotted upon the Quinaielt Indian Reservation.

All of said petitioners, aside from being Quinaielt Indians, are protected in their rights to tribal lands and tribal property by the saving clause of the Act of June 7, 1897.

The Act of June 7, 1897, (see Appendix "E"), has no application to the children of an Indian father, or the children of an Indian father and Indian mother, and the District Court so found. All petitioners come within this classification excepting those in the case in which Virginia Walkowsky and others are plaintiffs, the case in which Louise E. Henry and others are plaintiffs, and the case in which Alvin Smith and Eugene Smith are plaintiffs.

V.

SHOULD THE PETITIONERS BE DENIED THEIR RIGHTS TO ALLOTMENTS ON THE GROUND THAT THEY LIVE IN MIXED WHITE AND INDIAN COMMUNITIES, THE ORIGINAL TRIBAL HABITAT OF THEIR TRIBE OR BAND, AND NOT UPON ANY RESERVATION, IN VIEW OF THE EXECUTIVE ORDER OF NOVEMBER 4, 1873, AND THE ACT OF MARCH 4, 1911?

In this connection it is well to observe that the treaty provided in Article 2, Kappler's Laws & Treaties, Vol. II, page 719:

> 1st. "And the said tribes and bands agree to remove to and settle upon the same (the reservation) within one year after the ratification of this treaty, or sooner if the means are furnished them."
>
> 2nd. "In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant."

Article 6 of the Quinaielt Treaty (Volume 2, Page 720, Kappler's Laws & Treaties) provided that the said reservation might be assigned to individual Indians who should elect to locate on the reservation as a home under the terms of the treaty with the Omahas, *so far as the same may be applicable,*

(see Article 6 in Appendix "A") and the same Article 6 provided that the President of the United States might consolidate the Indian tribes signing the treaty with other friendly tribes and bands. (See Article 6, Appendix "A").

We have heretofore discussed and will hereafter discuss the reasons why the petitioners did not and could not live upon the Quinaielt Reservation when they first applied for allotments, and have shown that the Executive Order of 1873 and the allotment Act of March 4, 1911, were not designed to exclude petitioners, but to include them.

That Congress had in mind at all times that Indians were not to be penalized for adopting the habits and customs of civilized life and associating and affiliating with the white people, (which in these cases was involuntary) was first exemplified by the Act of June 14, 1862 (12 Stat. L. 427, R. S. 2119), dealing with the protection of Indians desiring to adopt the habits of civilized life.

Next, the Act of March 3, 1875, (18 Stat. L. 420) dealing with Indians abandoning tribal relations, being entitled to the benefit of the homestead law, but at the same time saving their rights to all tribal property.

Then came the Allotment Act of February 8, 1887, (24 Stat. L. 388) (see Article 6 in Appendix "A"). This act provided for allotments in sever-

alty and was aimed to break up finally all tribal association.

Then the Act of August 9, 1888, (25 Stat. L. 392), the Act of June 7, 1897, (30 Stat. L. 90) and the Act of May 8, 1906, (34 Stat. L. 182). Then finally the Citizenship Act of June 2, 1924, (see Appendix "G"). All of these Acts of Congress, and many others of like tenor, show a studied policy, a direct intent on the part of Congress that these people should not be penalized for giving up the customs and habits of their forefathers and living as civilized men. All these acts are particularly applicable to the situation of the petitioners who could not go upon the reservation owing to conditions described herein.

REASONS FOR GRANTING THE WRITS.

I.

(CONFLICTS OF DECISIONS OF CIRCUIT COURTS OF APPEAL AND OF OTHER COURTS; TREATY, STATUTES, ETC. NOT YET CONSTRUED)

The Circuit Court of Appeals decided a number of questions of Federal law, involving an Indian Treaty, an Executive Order and several acts of Congress, and decided those questions in a way which is either in conflict with the applicable decisions of this Court, or else have not been, but should be, authoritatively decided by this Court in the public interest.

1. The Circuit Court of Appeals held that under the Quinaielt Treaty of 1855-1856 (10 Stat. L. 1043), residence and location on a reservation is a prerequisite to an allotment, and bases this reasoning upon the sixth article of the Treaty with the Omahas. (10 Stat. L. 1043).

It is observed that Article 6 of the Quinaielt Treaty is based upon Article 6 of the Omaha Treaty, *"so far as the same may be applicable."*

The Circuit Court of Appeals strictly construes Article 6 of the Omaha Treaty and applies it to the Quinaielt situation, overlooking entirely the words in the Quinaielt Treaty, that it should follow the Omaha Treaty *"so far as the same may be applicable,"* and to the situation there existing.

2. This decision is in conflict with the decision of the same Circuit Court of Appeals in the case of *Bonifer vs. Smith*, 166 Fed. 846, construing a similar provision contained in the Treaty with the Walla Walla, etc., Indians (12 Stat. L. 954), Article 6. It is also in conflict with the decision of this Court in the case of *Hy-yu-tse-mil-kin vs. Smith*,, 194 U. S. 401.

3. The decision of the Circuit Court of Appeals overlooks the fact that in each of the complaints there is contained an allegation that each of the petitioners desires to go upon the reservation and locate thereon, but has been denied that right,

and that these allegations are in substance admitted. (See Statement page 15).

4. The decision of the Circuit Court of Appeals is in conflict with the construction placed upon the Treaty by the rules and regulations and decision of the Department of the Interior, from the year 1905 down to the present time, as is shown by the statement that only 200 out of 1414 allottees live upon the reservation and but 6 live upon their allotments. The decision is also in conflict with the decision in the case of *Francis C. Mounts, et al, vs. United States*, Equity No. 385, in the District Court for the Western District of Washington, wherein a consent decree was entered in November, 1929, pursuant to the opinion of the Secretary of the Interior dated November 1, 1929. (The Attorney General SWR-M 90-2-11-143 A. L.; see Appendix I).

5. The decision of the Circuit Court of Appeals conflicts in this particular with the decisions of the United States District Court for the Western District of Washington, in the case of *Agnes Elliott, et al vs. United States*, (Equity 272), the case of *Anna Jette Jackson vs. the United States* (Equity 222), *Tim Driscoll vs. the United States* (Equity 271), *Daisy Borg vs. the United States* (Equity 240), and the case of *Ellen Baker, et al, vs. the United States* (Equity 250) (Unreported), all these cases being decided in June of 1926, and never ap-

pealed by the United States. This conflict is mentioned to show the complete reversal of the attitude and policy of the Department toward these Indians.

6. The contention that this treaty requires residence and location on an Indian reservation as a condition to allotment, has never been passed upon by this Court, and this Court has never passed upon the effect of the refusal of the Department of the Interior to permit an Indian to locate upon a tract of land upon an Indian reservation to which he claims the right to an allotment.

II.

The Circuit Court of Appeals holds that the Executive Order of November 4, 1873, applies only to Quinaielt, Quileute, Hoh, Ozettes and Quits or Quaitso (Queets) Indians, and then states that the Hohs are but a band of Quinaielts, and the Quits or Quaitso a part of the Quinaielt tribe. (R. 638, 639). This leaves, as entitled to allotments, only the Ozettes, who, in 1901, numbered 44, and in 1906 numbered 35. (Handbook of American Indians. Part 2, page 180).

The Executive Order of November 4, 1873, (Kappler Ind. Affairs, Laws and Treaties, Vol. I, 2nd Ed., pp. 923-924) by its terms increases the reservation from 10,000 to 224,000 acres and provided:

"*for other Indians* in that locality"

and that it be withdrawn from sale and set apart for the use of the

> "Quinaielt, Quillehute, Hoh, Quits, *and other tribes* of fish-eating Indians on the Pacific Coast."

This Court has never passed upon or construed the Executive Order of November 4, 1873.

III.

The decision of the Circuit Court of Appeals fails to give effect to the provisions of the Act of June 7, 1897, (See Appendix E) and is in conflict with its own decision, with the many unappealed decisions of the District Court of the Western District of Washington, Southern Division, alloting the Quinaielt Reservation, the decisions of other United States Circuit Courts of Appeal, the decisions of the United States Court of Appeals for the District of Columbia, and the rulings of the Department of the Interior construing this Act.

The petitioners herein may be placed in three classes:

(a) Children of the marriage of a white man and an Indian woman, said marriage having been solemnized prior to the Act of June 7, 1897.

(b) Children of an Indian father. The wording of the Act of 1897 clearly shows that

it has no application to this class. The trial court so held but was reversed by the Circuit Court of Appeals.

(c) Children of an Indian father and an Indian mother. The Act has no application to this class. Trial court so held but was reversed by Circuit Court of Appeals.

1. The decision of the Circuit Court of Appeals conflicts with the decision of the same court in the case of *Pape vs. United States* (19 Fed. 2nd 219), wherein it is held that the children of a white man and an Indian woman follow the status of their father. In the case of some of the petitioners, such as the Halbert children and the children of William A. Elliott and Charles G. Elliott, the decision of the Circuit Court of Appeals passes over the father, who in each case is an enrolled, recognized and allotted member of the tribe, to the grandmother as a basis for disqualifying such petitioners.

2. The decision of the Circuit Court of Appeals also conflicts with the decision of the same court in the case of *Bonifer vs. Smith* (166 Fed. 846). In this case it was said:

"We are not justified in assuming that it was the intention to lay down the rule that the allotment was not intended for the benefit of Indians who at the time were residing neither on the reservation nor within the limits of the

lands included in the cession of territory to the United States."

3. The decision conflicts with the local decisions of the District Court which were final and acquiesced in by the Department. The cases are cited at page 26 of this petition.

4. The decision conflicts with the decision of the United States Circuit Court of Appeals for the Eighth Circuit as announced in the case of *Vezina vs. United States* (245 Fed. 411) Plaintiff in that case was one of eight children of an Indian mother and white father, married prior to the Act of June 7, 1897. Plaintiff was born and reared in Canada, she later lived in St. Paul, then married a Frenchman, moved to Mendota, Wisconsin, and then to Minneapolis. The Court held that plaintiff under this statute (June 7, 1897) is clearly entitled to be recognized and treated in all respects as if she had remained on the reservation. (R. 420 opinion).

5. The decision conflicts with the decision of the United States Circuit Court of Appeals, Eighth Circuit, in the case of *Oakes et al vs. United States* (172 Fed. 305). In that case the daughter of Mrs. Oakes, an Indian named Jane B. Jones, was allotted land on a reservation, though this daughter was born and reared in the City of St. Paul off the reservation, because she was born of a marriage between an Indian woman and a white man solemnized prior to the passage of the Act of 1897.

The petitioners herein who are the children of Louise E. Henry, Kate Walkowsky Weiss, and Lizzie Rolfson, all Indian mothers, are children of marriages of white men and Indian women solemnized before the passage of the Act of 1897. The mothers of these petitioners were encolled, recognized and allotted as members of the Quinaielt tribe of Indians.

6. The decision conflicts with the decision of the Court of Appeals of the District of Columbia in the case of *United States ex rel. Besaw vs. Work* (6 Fed. 2nd. 694).

In that case it is stated at page 695 that relator Besaw did not remove to the reservation but continued to reside upon his farm separate and apart from the tribe. He had never taken up his residence on the reservation. At page 697 of the decision it is held that relator Besaw comes within the saving provisions of the Act of June 7, 1897, and his right is sustained.

Of a like nature is the case of *Work vs. United States ex rel. Gouin*, Court of Appeals, District of Columbia, (18 Fed. (2nd) 820) where applicant lived in North Dakota and was held entitled to her rights on the White Earth Reservation in Minnesota.

7. The decision of the Circuit Court of Appeals conflicts with the decision of the Secretary of the Interior in the case of *Crichton vs. Shelton* (33 L. D. 205), where it was held that under the

Act of 1887 reservation Indians were not required to settle upon, improve, or maintain a residence upon their allotments, and the childrens' rights would be preserved by the Act of June 7, 1897.

8. The decision also conflicts with the decision of the Secretary of the Interior in the case of *Addie Prickett et al* (50 L. D. 554) where it was held that children born of a marriage of an Indian woman and a white man solemnized prior to the Act of June 7, 1897, the mother then living apart from the tribe, did not have to be born on the reservation or among Indians in order to share in tribal property.

9. The decision also conflicts with the decision of the Department in the case of *Francis C. Mounts, et al, vs. United States*, Equity No. 385. United States District Court for the Western District of Washington, Southern Division, wherein it was stipulated by the Secretary of the Interior and the Attorney General that a decree be entered in a case brought by one Frank Mounts, Indian father, upon behalf of his three minor children, neither Frank Mounts nor his minor children ever having lived upon any Indian reservation. This decision was rendered November 1, 1929, just six days prior to the argument of these cases before the Circuit Court of Appeals and after briefs were filed in these cases. (See Appendix I).

10. The decision also conflicts with the allotment instructions of the Department of the Interior as contained in Section 324 of the Regulations, 1904, as amended. (See Appendix H), the same being in effect at the time of these trials in the District Court. (R. 439-441).

Under these instructions 1414 Indians have been allotted upon this reservation, only 200 of whom ever lived upon the reservation. (R. 383-466).

IV.

The Circuit Court of Appeals in its opinion in the Rolfson case (one of the cases included in the present petition), concludes that the Chehalis Indians (of whom the Quinaielt is but a branch) Upper and Lower Chehalis, and the Cowlitz Indians, were not affiliated with the Quinaielt and Quillehute tribes in the Treaty of 1855 and 1856 within the meaning of the Act of Congress of March 4, 1911. (Appendix F) (R. 666).

That as the Quits and the Hohs signed the treaty, the conclusion is that there were no tribes affiliated with the signers of the treaty. (R. 662). The decision also excludes the Chinooks (R. 663) from the list of affiliated Indians.

The Circuit Court of Appeals, in construing this Act, makes it apply only to Indians living on the Quinaielt Reservation or on some small execu-

tive order reservations in that vicinity. (R. 637, 638, 339, 640). The opinion of the Court of Appeals on page 639 of the record states that under the General Allotment Act the Quillehute Indians residing upon the Quillehute Reservation, Hoh Indians residing upon the Hoh Reservation, Quit (Queets) Indians residing on the Quit (Queets) Reservation, were entitled to allotments upon these reservations specially set apart for their use. The court on page 640 of the record dwells upon the necessity of these Indians residing on these little executive order reservations in order that they may be permitted, under the Act of 1911, to elect to take allotments on the Quinaielt Reservation rather than on their own reservation, and the court, in applying this doctrine to petitioners, holds that they are not entitled to allotments because they never had any reservation. We answer that the Quit or Queets never had a reservation. See Bureau of American Ethnology, Bulletin 30, Part 2, pages 387, 388, 389, giving a list of all reservations in Washington. The Court's construction of the Executive Order of 1873 (See Appendix C and the Act of 1911; see Appendix F) in effect would exclude from allotment on the Quinaielt Reservation the Queets Indians, although this tribe is expressly mentioned in the Executive Order of 1873, (See Appendix C) for how could the Queets elect to take allotments on the Quinaielt Reservation rather than

on their own reservation when they had no reservation, hence no election. (R. 317, 318, 319, 320, 325).

The Supreme Court of the United States has never construed the Act of March 4, 1911, in its relation to the Executive Order of November 4, 1873, to indicate what was meant by the expression

> "other Indians in that locality and other fish-eating Indians of the Pacific Coast."

V.

Circuit Court of Appeals Holds Petitioners Not Entitled to Allotment Because They Are American Citizens

The Circuit Court of Appeals hold that these petitioners are American citizens and are for that reason not entitled to allotment as Indians (R. 651). In this connection the Court speaks only of the two children of Lizzie Rolfson, but there is no question but that this theory runs through the entire decision.

The decision on this point fails to take into consideration the Acts of Congress beginning with that of February 8, 1887, (See Appendix D) down to and including the Act of June 2, 1924, (43 Stat. L. 253 c. 233) (Appendix G), preserving to Indian citizens their rights to tribal property and tribal lands.

The ruling of the Circuit Court of Appeals, holding that because an Indian is a citizen of the United States he loses all right to his tribal property, is a matter of great public importance and affects every Indian within the territorial limits of the United States.

VI.

The Circuit Court of Appeals holds that petitioners, whose parents and grandparents have been duly enrolled, recognized and allotted as Quinaielt Indians, must themselves be adopted into the tribe as Quinaielt Indians before they can be entitled to allotments. (R. 648-649-652). We find no precedent for such ruling and we submit that the same is against the law and the decisions of the Courts and the Department of the Interior.

WHEREFORE, it is respectfully submitted that this petition should be granted.

OVERTON G. ELLIS,
A Member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington.

STUART H. ELLIOTT,
H. G. ROWLAND,
DIX H. ROWLAND,
Counsel for Petitioners,
Tacoma, Washington.

BRIEF IN SUPPORT OF PETITION

JURISDICTION.

The Circuit Court of Appeals, Ninth Circuit, on February 24, 1930, entered decrees in favor of respondent and against the petitioners in the several cases herein, which had been combined for purposes of trial and appeal, reversing the decree of the trial court in each case. (R. 670 to 686 inclusive). This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (43 Stat. 936).

STATEMENT.

The facts and a statement of the questions presented sufficiently appear in the Petition.

SPECIFICATIONS OF ERRORS

The Circuit Court of Appeals erred as follows:

1. In holding that petitioners are not entitled to allotment, although it appears that petitioners are either Quinaielt Indians or other fish-eating Indians of the Pacific Coast contemplated by the Executive Order of November 4, 1873, and notwithstanding the fact that the Quinaielt Reservation was enlarged from 10,000 acres to 224,000 acres, especially to provide for them, and although petitioners, at the time of applying for allotment, lived in the original tribal habitat of their ancestors, where many members of their families have been allotted, and although petitioners have been denied

by respondent the right to go upon or reside upon the reservation.

2. In applying to petitioners the rule of necessity of prior residence as a condition to allotment on the Quinaielt Reservation, which is a heavily timbered area and unfit and unsuited for a home until the land is cleared.

3. In holding petitioners to be without right of allotment because of non-residence on the Quinaielt Indian Reservation, such reservation being specifically covered by an executive order which provides for *other Indians in that locality*, and there being a specific act of Congress expressly providing for allotments from surplus land *after allotments to Indians on such reservation have been completed.*

4. In refusing to hold that petitioners who are children of an Indian woman and a white man whose marriage occurred prior to the passage of the Act of June 7, 1897, are entitled to allotment, the fact being that petitioners and their mother were and now are living in their original tribal habitat and in the same place where such Indian mother was recognized, enrolled and allotted as a Quinaielt Indian.

5. In applying the Act of June 7, 1897, to such of petitioners as are children of an Indian father who was duly recognized, enrolled and al-

lotted as a Quinaielt Indian, and in refusing to hold that said Act of June 7, 1897, only applies to the children of an Indian woman and a white man.

6. In applying the Act of June 7, 1897, to such petitioners as are children of an Indian father and an Indian mother, where either the father or mother or both were duly recognized, enrolled and allotted Indians of the Quinaielt Indian Reservation, and in refusing to hold that said Act of June 7, 1897, applies only to the children of an Indian woman and a white man.

7. In refusing to consider material the facts that the delay in allotting the reservation was caused by the unlawful acts of the respondent and its officers and representatives, through no fault of petitioners, and that, by reason of such delay, petitioners were forced to live and work away from the reservation at some gainful employment.

8. In holding that petitioners are without the right of allotment on the Quinaielt Indian Reservation for the reason that petitioners have in a measure adopted the habits and customs of civilized life by living in mixed white and Indian communities off the reservation, the sites of which communities are the original habitat of the tribe or band to which their progenitors belonged.

9. In denying petitioners' rights to allotments of land on the Quinaielt Reservation on the

ground that only the descendants of the tribes and bands of Indians who signed the treaty of 1855 and 1856 are entitled to allotment on this reservation, notwithstanding that the special act of Congress, the Act of March 4, 1911, (See Appendix F), expressly provides for allotment to "*other tribes of Indians in Washington* who are affiliated with the Quinaielt and Quillehute Indians in this treaty after allotments to Indians on the reservation have been completed.

10. In holding that certain of petitioners who are citizens of the United States are by reason thereof not entitled to allotments of land on the Quinaielt Indian Reservation. (R. 651).

11. In holding that children of duly recognized, enrolled and allotted Quinaielt Indians must be adopted into the Quinaielt tribe before being entitled to allotments of land on the Quinaielt Indian Reservation. (R. 652).

CASES HEREIN TO WHICH EACH SPECIFICATION OF ERROR APPLIES

(a) Of the above Specifications of Error, Numbers 1, 2, 3, 7, 8, 9 and 10 are made for and are applicable to the cases of all the petitioners in all the cases herein consolidated for trial and appeal.

(b) Specification of Error Number 4 is made in behalf of, and is applicable to, the case of the

petitioners in the actions wherein Virginia Walkowsky, et al. are petitioners; to the case wherein Agnes Rubens, et al. are petitioners; and to the case wherein Alvin Smith et al. are petitioners.

(c) Specification of Error Number 5 is made in behalf of and is applicable to the case of the petitioners in the actions wherein Hilary Halbert, Jr., et al. are petitioners; to the case wherein Rich Halbert is petitioner; to the case wherein Vernon Sidney Halbert is petitioner; to the case wherein Sidney Seth Halbert is petitioner; to the case wherein Edna May Elliott, et al. are petitioners; and to the case wherein Charles G. Elliott, Jr., et al, are petitioners.

(d) Specification of Error Number 6 is made in behalf of and is applicable to the case wherein Lulu M. Elliott, et al. are petitioners; to the case wherein Mary Barichio Petit, et al. are petitioners; to the case wherein Dewey Barichio, et al. are petitioners; and to the case wherein Rose Peers Pickernoll, et al. are the petitioners.

(e) Specification of Error number 11 is applicable to all the cases herein which were combined for the purposes of trial and appeal, excepting the case in which Mary Francis Provoe, et al. are petitioners, and in the case in which Rose Peers Pickernoll, et al. are petitioners.

ARGUMENT.

I.

THE EXECUTIVE ORDER OF NOVEMBER 4, 1873 (Appendix C) AND THE ACT OF MARCH 4, 1911, (Appendix F), WERE INTENDED TO PROVIDE FOR NON-RESERVATION INDIANS OF SOUTHWESTERN WASHINGTON.

The opinion of Circuit Court of Appeals holds that the Executive Order of November 4, 1873, applies only to Quinaielt, Quillehute, Hoh, Ozettes and Quits or Quaitso (Queets) Indians, and then states that the Hoh Indians and the Quits or Quaitso Indians are bands of Quinaielts, and the Quits or Quaitso (Queets) were a part of the Quinaielt tribe. This leaves only the Ozettes, numbering but 44 in 1901 and 35 in 1906 (R. 638, 639) for whom the reservation was enlarged.

It would therefore appear that the Hoh and the Queets were entitled to allotment under the Treaty, and there would have been no necessity of an Executive Order or the Allotment Act of 1911 to cover these. That raises the question: Was the Executive Order of 1873 promulgated and the reservation enlarged from 10,000 to 224,000 acres for the purpose of alloting but 44 or 35 Indians?

This view, in our opinion, is inconsistent with a proper understanding and conception of the purposes of the Executive Order of November 4, 1873,

and the Act of March 4, 1911. (See Appendix C and F).

The petitioners herein qualify as Quinaielt Indians or other Indians in that locality, and as fish-eating Indians of the Pacific Coast as established by the record and found by the trial court.

All the petitioners herein, at the time they were entitled to apply for allotments on the Quinaielt Indian Reservation, were living in the original tribal habitat of their ancestors, as set forth in the petition herein.

Governor Isaac I. Stevens, under authority of the President and Congress, negotiated treaties and dealt by means of treaties with all the Indians of Western Washington, save and except certain tribes and bands of Southwestern Washington. These treaties are known as The Treaty with the Makah (12 Stat. L. 939), Treaty with Nisqually, etc. (10 Stat. L. 1132), Treaty with the Dwamish, etc. (12 Stat. L. 927), Treaty with the Quinaielts, etc. (12 Stat. L. 971). It was his intention to deal with and provide for all the Indians of Southwestern Washington. (R. 385, 386, 387, 545 to 553) (Swan's Three Years at Shoalwater Bay, pages 337-344).

The Governor, carrying into effect his policy of summoning groups of Indians of the same racial stock, language, custom and affiliation, called together on February 25, 1855, 350 representatives of

the Lower and Upper Chehalis, Quinaielt, Quillehute, Chinook and Cowlitz Indians, which then numbered 843. He failed in securing the signatures of all these tribes, except the Quinaielt, Quillehute and one Lower Chehalis. (R. 386, 334). This left the Lower and Upper Chehalis, Chinooks and Cowlitz fish-eating Indians of the Pacific Coast of Washington unprovided for. Hence the necessity for the Executive Order of November 4, 1873, the promulgation of which was further made necessary because Congress had on March 3, 1871, passed an act forbidding further treaties with Indian nations, tribes or powers. (See Appendix B).

All these petitioners were denied by the respondent the right to go upon, reside upon or locate upon the reservation. (See Statement in Petition, page 15).

II.

Physical Condition of Reservation—Its Importance

The physical conditions of this reservation are as set forth in the petition and preliminary statement, as disclosed by the record. (R. 383, 404, 426, 446, 500).

It is argued by respondent and found by the Circuit Court of Appeals that the requirement as to settlement and location on this reservation is based upon Article 6 of the Treaty with the Omahas.

We contend on behalf of the petitioners that Article 6 of the Quinaielt Treaty is based upon Article 6 of the Omaha treaty, so far as it concerns residence and location on this reservation, and Article 6 of the Quinaielt Treaty clearly states, with reference to the Omaha Treaty, that the same shall apply

"so far as the same may be applicable."

We may well conclude that the treaty makers had in mind the physical condition of the Quinaielt Reservation as distinguished from that of other reservations of open prairie or agricultural land, adaptable at once for means of livelihood and upon which the Indians could immediately move and make a living.

Those responsible for the Executive Order of 1873 and the Allotment Act of 1911 had this in mind when they both definitely provide for Indians other than those living or located on the reservation.

III.

Purpose of Executive Order of November 4, 1873. (Appendix C)

The Executive Order of November 4, 1873, (see Appendix C) had three distinct objects:

1. To provide sufficient lands to allot the Quinaielt and Quillehute Indians under the provisions of this treaty.

2. To provide for other Indians in that locality.

3. To provide for other tribes of fish-eating Indians on the Pacific Coast.

The wording and meaning of the Executive Order are not doubtful (See Appendix C), and the holding of the Circuit Court of Appeals, that only Quinaielt, Quillehute, Hoh, Quit and Ozette Indians actually living on a reservation are entitled to allotment, is plainly erroneous. The so-called reservation of the Hohs, Ozettes and Quillehutes are but a single section or one and one-third sections of land. (Handbook of American Indians, Part 2, page 388). Few Indians live upon them and certainly the Indians of these tribes could not elect to take allotments on their own reservations for none of these reservations is large enough to allot more than a handful of Indians.

There was no authority to allot under the Executive Order, hence the General Allotment Act of 1887 and the Special Allotment Act of March 4, 1911 (See Appendix F) were passed. The latter act expressly provided for allotments of lands to Indians after the Indians on the reservation had been allotted, showing that residence on the reservation was not necessary. To make this clear, the act further provided for such Indians as are affiliated with the Quinaielts and Quillehutes in the

Treaty of 1855 and 1856. This simply carried out the provisions of the Executive Order.

The respondent at the time of trial admitted that the Executive Order of November 4, 1873, and the Allotment Act of March 4, 1911, were made in conformity each to the other and must stand together,

> "and not for the purpose of one repealing the other." (R. 446, 447).

OPINION OF SOLICITOR FOR INDIAN DEPARTMENT (Quoted by District Court, R. 295-326).

The Solicitor for the Interior Department held that the scattered fish-eating Indians of Southwestern Washington were affiliated with the Indians who had signed the treaty, and the Department, adopting that opinion as its allotment instructions, has consistently allotted on the Quinaielt Indian Reservation not only Quinaielts and Quillehutes, but also Upper and Lower Chehalis, Chinook and some Cowlitz Indians without requiring adoption or residence on a reservation. (See Preliminary Statement in Petition).

In 1872 the Superintendent of Indian Affairs for Washington Territory reported and recommended that all tribes made parties to the Quinaielt Treaty, together with the remnants of the Chehalis, Humptulips, Shoalwater Bay and Chinook tribes, residing along the coast south of the reservation to

the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish eaters, and draw their subsistence almost wholly from the water, and therefore have but little taste or desire for agriculture or land production, and that the reservation be enlarged for them. The reservation was, as a result of this recommendation, enlarged to nearly 224,000 acres to provide for them. (R. 298, 299). The Solicitor for the Department of the Interior, in an opinion to the Secretary dated in 1916 quoted by the District Court (R. 295-326) and introduced in evidence, reviews all the previous decisions of the Department and concludes that the term "fish-eating Indian of the Pacific Coast" did not include all bands and tribes west of the Cascade Mountains, but that it did include the fish-eating Indians in Washington

> "South of the Neah Bay or Makah Reservation to the mouth of the Columbia River" (R. 324)

The Solicitor thus construed the Executive Order of November 4, 1873. In construing the Act of March 4, 1911, the Solicitor said,

> "The Indians along the Pacific Coast of Washington described as 'fish-eating Indians' are more or less affiliated although divided into numerous tribes and bands." (R. 325).

The District Court followed the Solicitor's opinion and concluded (R. 327) that, aside from the

Quinaielts and Quillehute Indians, the Indians of the Chehalis, Upper and Lower, Chinook, Cowlitz, and the so-called Shoalwater Bay bands are entitled to allotments on the Quinaielt Indian Reservation.

The District Court in construing the Act of March 4, 1911 (Appendix C), concluded that the word "treaty" in this act was used in the broad sense to include not only the treaty itself as finally signed, but the prior negotiations in which all these Indians participated, held at Cosmopolis, Washington, in February, 1855. (R. 336). It is only by taking this view that the enlargement of the Quinaielt Indian Reservation from 10,000 acres to 224,000 acres can be explained, and it is only by placing this construction upon the word "treaty" as used in the Act of March 4, 1911, that the action of the Department of the Interior in allotting 1414 Indians upon this reservation, members of the tribes and bands above mentioned, without adoption and without requiring residence, can be satisfactorily explained.

IV.

Erroneous Application of Act of June 7, 1897. (Appendix E)

Where Parents Were Married Prior to 1897.

The petitioners, Virginia, Alvin and Catherine Walkowsky, were born of a marriage solemnized January 9, 1893. Their mother was a duly en-

rolled, recognized and allotted Quinaielt Indian. (R. 521-522).

The petitioners, Eugene Smith and Alvin Smith, were born of a marriage solemnized in February, 1877. (R. 472). The Circuit Court of Appeals finds that the mother, Lizzie Rolfson, from her birth, was and is an Indian entitled to all the rights of an Indian upon the Quinaielt Indian Reservation, (R. 652).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, were born of a marriage solemnized in the year 1890. (R. 491). The mother of above named, Louise E. Henry, is a duly recognized, enrolled and allotted Quinaielt Indian.

The holding of the Circuit Court of Appeals, in denying these petitioners the right to allotment, is contrary to the applicable authorities, as these petitioners are clearly saved by the provisions of the Act of June 7, 1897. (See Appendix "E"). The following cases are directly in point:

Oakes, et al. vs. United States, (172 Fed. 305);

United States, ex rel Besaw, vs. Work, (6 Fed. (2nd) 694);

Vezina vs. The United States, (245 Fed. 411);

Pape vs. U. S., (19 Fed. (2nd) 219);

Agnes Elliott vs. U. S., District Court Western Washington (E-272) Unreported;

Crichton vs. Shelton, (33 Land Decisions 205);

Addie Prickett, et al. (50 Land Decisions 554);

Allotment Rules and Regulations of Department of the Interior (R. 525 and set forth in Appendix "H");

(Solicitor's Opinion, R. 295 to 326).

V.

SAME—WHERE FATHER IS AN INDIAN

The decision of the Circuit Court of Appeals makes the Act of June 7, 1897, apply to the case where the father is an Indian. This we contend was error.

We know of no better case on this point than the decision of this same Circuit Court of Appeals in the case of *Pape vs. The United States*, (19 Fed. (2nd) 219), where, speaking of mixed marriages between Indians and whites, it is said:

> "Our conclusion is that the status of Eugene *follows the condition of the father*, and the decree of the District Court must be sustained. *Smith vs. Bonifer* (CC) 154 Fed. 883."

See also the recent case of *Francis C. Mounts, et al, vs. the United States,* (Opinion of Attorney General, November 1, 1929, SWR-M 90-2-11-143 A. L.), in which case all the children of an Indian father and a white mother were allotted on this reservation, and neither father nor the children lived thereon. (See Appendix "J").

The petitioners affected by this error are set forth following Specification of Error No. 11 in paragraph (c), page 41.

VI.

Same—Where Both Father and Mother Are Indians

The decision of the Circuit Court of Appeals applies the Act of June 7, 1897, to cases wherein both the father and the mother are Indians.

We contend that the act has no application to this state of facts. We know of no decision of any court which places this construction on this Act.

The petitioners affected by this error are as set forth following Specification of Error No. 11 at paragraph (d), page 41.

The Circuit Court of Appeals in its decision goes so far as to deny the children of an Indian father and an Indian mother their right to an allotment where both the father and mother are duly enrolled, recognized and allotted Quinaielt Indians.

(Case of *Lulu Elliott, et al. vs. the United States*, No. 312-E).

The above facts are admitted by the pleadings. (R. 130-136).

VII.

The Interior Department in 1910 and 1911, when R. A. Ballinger was Secretary, held that Indians were not entitled to allotments on the Quinaielt Reservation on the ground that this land was classed by the Department as timber land (R. 428), and that the timber should be sold to private timber companies and the money paid thereon placed in a tribal fund. (See letter of January 19, 1914, written by E. B. Meritt, Assistant Commissioner of Indian Affairs) (Appendix "I"). The decision of this Court in the case of *Payne vs. U. S.*, 264 U. S. 446, (1924), definitely sets aside this theory and policy. Nevertheless the opinion of the Circuit Court of Appeals reversing the trial court bases its opinion upon a letter written by R. A. Ballinger, Secretary of the Interior, and dated February 18, 1910, (R. 641-643), and disregards the opinion of the Solicitor for the Interior Department written September 2, 1916, almost seven years later, this opinion being written at the request of Secretary of the Interior Franklin K. Lane. All of the important facts in this connection are set forth in the opinion of the trial court. (R. 285 to 326).

The letter of Secretary Ballinger, above referred to, was not introduced in evidence at the trial of the cause, nor was any reference made to it. It appears first in the record in the opinion of the Circuit Court of Appeals. This could readily have been answered by the contemporaneous records of Congress. We think it is sufficiently answered by the opinion of the Solicitor for the Interior Department cited by the District Court and admitted to be the allotment instructions at the time of the trial. (R. 439-440-441).

Conforming to Acts of Congress and previous policy and rulings of the Department of the Interior, Secretary of the Interior Wilbur, under date of June 8, 1929, announced his policy of dealing with Indian affairs in an article in the Saturday Evening Post entitled "Uncle Sam Has a New Indian Policy." The article stated his policy, placing no penalty upon non-resident Indians, but encouraging them to live, associate and mingle with their white neighbors, not from necessity as in these cases, but as a matter of policy in the attempt to solve a question long perplexing to the Department and the country at large.

VIII.

PETITIONERS HAVE LIVED ALL THEIR LIVES IN THE ANCESTRAL HABITAT OF THEIR TRIBES.

The matter of non-residence and the adoption of the habits and customs of civilized life has been

heretofore discussed, but, in this connection and in addition to what has been stated, the record is conclusive that all petitioners live in the tribal habitat of the fish-eating Indians of Southwestern Washington and the Pacific Coast. The adult petitioners and the parents of the minor petitioners are engaged in the occupation of fishermen, as have been their ancestors from time immemorial. Their condition has not changed in any respect, save from contact with white people who have moved in and around them. These cases are not cases where there has been any change in the status of the petitioners. Their status and location in 1873, when the Executive Order was promulgated, was identical with their status and location in 1911, when the Allotment Act was passed, and their status and location was the same at the time of their application for allotments. They are in no respect different from the majority of the 1414 Indians who have already been allotted without regard to residence, and are members of and belong to tribes and bands of Indians which the Department of the Interior has, for the past 25 years, held and ruled were entitled to rights on the Quinaielt Reservation.

IX.

Specification of Error No. 9 has been heretofore discussed in argument of Specification of Error No. 3.

X.

The General Allotment Act of February 8, 1887, (24 Stat. L. 388, Sec. 6), made all Indians allotted under the act, as well as other Indians, citizens of the United States, but it also preserved their rights in tribal property and tribal lands. The Circuit Court of Appeals, in the case herein, wherein Alvin Smith and Eugene Smith were plaintiffs in the District Court, denied the allotments sued for because these plaintiffs were citizens of the United States. All the numerous Acts of Congress pertaining to Indians passed since the Act of 1887 down to and including the Act of June 4, 1924 (Appendix "G"), preserved to Indians who had become citizens their rights in tribal property and tribal lands. This holding of the Circuit Court of Appeals is, we submit, contrary to the statute and affects every Indian in the United States, for under the provisions of the last named Act, all Indians are made citizens of the United States.

XI.

The decision of the Circuit Court of Appeals, in these cases, in holding that children of duly recognized and allotted Quinaielt Indians must be adopted into the tribe before they are entitled to tribal rights, presents a legal principle not heretofore approved by any court so far as we have been able to find. It seems opposed to all known concep-

tions of the rights of children of recognized Indians.

The Act of June 7, 1897, if applicable, (25 U. S. C. A. 184), was passed expressly to provide for and save the rights of such Indians as the children of Lizzie Rolfson, and the other petitions who are the offspring of marriages contracted before the passage of the Act. All cases that have been cited by petitioners and respondent, including the case of *Oakes, et al, vs. United States*, (172 Fed. 305), so strongly relied upon by respondent, sustains this position.

A historical inadvertence is found in the opinion of the Circuit Court of Appeals at page 634 of the record, where it is stated that the Territory of Washington at one time included the present State of Oregon.

Distinction Between These Cases and Lemieux v. United States.

It is to be noted that the Circuit Court of Appeals gives great weight to the decision of *Lemieux vs. the United States*, (15 Fed. (2nd) 518). That case was decided against the plaintiff because he was guilty of laches in bringing suit. A dictum in the case discusses residence, but it has no application to the present cases. In the Lemieux case, there was no Executive Order and no special Allotment Act providing for Indians not living on the reservation. The *Lemieux* case, moreover, distinguishes

the case of *Bonifer vs. Smith*, 166 Fed. 846, where non-reservation Indians were allotted because of special Allotment Acts following a treaty similar to the Treaty of 1855 and 1856 with the Quinaielt Indians.

The decision of the Circuit Court of Appeals at page 669 of the Record, criticises petitioners and their counsel for not exhausting their efforts with the Department of the Interior before bringing these suits. This criticism is unwarranted. The Circuit Court of Appeals entirely overlooks the testimony at Page 528 of the record, which shows that petitioners gave the Department of the Interior every possible opportunity to allot them before any suits were begun, and it also overlooks the fact that additional evidence was about to be offered to show this when respondent stipulated as follows:

> "It is here stipulated by the parties in all the cases on trial herein, that the plaintiffs in each instance have made selections for allotments and that the allotments have been objected to by the Department." (R. 528).

Again upon pages 643 and 644 of the record the Circuit Court of Appeals makes this comment:

> "* * * the applicants, notwithstanding their small proportion of Indian blood, are alleged to be Indians and this allegation seems to be admitted."

The fact that this comment was made, in the face of its conceded immateriality, has led us to fear that the decision was in some measure influenced by a belief that the petitioners are of small degree of Indian blood. However the court may have fallen into this error, the facts show that Indian blood is predominant in a large number of the petitioners. For example, the Barichios and Petits (R. 569), and Provoes (R. 581-587) are Indians on both sides of the family, as are the children of J. H. and Josephine Johnson Elliott. (R. 130-136). Kate Walkowsky Weiss (R. 521) is a full blood and her children are half bloods. Certainly the court did mean that the rights of these and the other petitioners in whom Indian blood predominates should be prejudiced because some of the petitioners might be of a lesser degree of Indian blood.

Distinction Between These Cases and Case of Wilbur, etc. v. United States, ex rel. Kadrie

We note the recent case of *Ray Lyman Wilbur, Secretary of the Interior, vs. United States ex rel. Kadrie, et al.* (30 Fed. (2nd) 989) (United States Supreme Court Advance Opinions, No. 10, 1929 Term, p. 433) decided by this Court April 14, 1930, upon a petition for Certiorari, and that this decision is to the effect that mandamus will not lie against the Secretary of the Interior to require him to place certain names of Indians upon an an-

nuity roll for money payments after the names had been stricken by an order of the Secretary following an opinion by the Solicitor for that Department.

This petition presents no such question. The petitioners are here proceeding under definite acts of Congress giving them the right to sue for allotments and perforce to ask final judgment for their allotments from the court to which they may appeal.

Upon several occasions this Court has had these acts of Congress before it:

In the case of *Leecy vs. United States*, (190 Fed. 289), (*Appeal dismissed* 232 U. S. 731) the decision of the Circuit Court of Appeals for the 8th Circuit said:

> "* * * The act of February 6, 1901, (31 Stat. 760, c. 217) provides:
>
> "* * * It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that, as allotments must be reported to the Secretary of the Interior for his approval, the absence of his approval would defeat the suit, when, of course, no one would want to bring a suit if he had that approval.
>
> "The claim of power under sections 441 and 463, R. S., is subject to the same criticism.

Why authorize a suit, if either of the sections conferred upon the Secretary of the Interior or upon the Commissioner of Indian Affairs general authority conclusive on the courts? Certainly Congress did not mean to authorize the bringing of wholly futile actions. A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so."

The Act of February 6, 1901, (31 Stat. L. 760 c. 217) had received further construction in the cases of *Sloan vs. U. S.*, 118 Fed. 283, (*appeal dismissed*, 193 U. S. 614), where it is said:

"This section was intended to vest the United States Courts with full authority to hear and *determine every question* arising in any suit brought by a claimant to an allotment; *and the fact that such questions have been decided by the land department adversely to the claimant neither affects the court's jurisdiction nor concludes it on any matter of law or fact.*"

Also see cases of *Morrison vs. Work*, 266 U. S. 481, *Hy-yu-tse-mil-kin vs. Smith*, 119 Fed. 114, and 194 U. S., 401, *Waldron vs. U. S.*, 143 Fed. 413, and cases cited. Also *Sully vs. U. S.*, 195 Fed. 113.

CONCLUSION

The petitioners are Indians and it is difficult for them to understand, or for counsel to explain to them, the ruling of the court which denies them allotments upon the Quinaielt Indian Reservation when a large number of their neighbors and relatives, in exactly the same situation, have been, without adoption and without prior residence on any reservation, allotted upon the same reservation. The policy adopted and pursued by the Department has been that of allotting the Quinaielt Reservation, without the necessity of prior residence and without the necessity of adoption into the Quinaielt tribe, to the fish-eating Indians of Southwestern Washington who are affiliated with the Quinaielts and Quillehutes in the Treaty of 1855 and 1856, in compliance with the Special Allotment Act of March 4, 1911, following the Solicitor's opinion and of alloting Quinaielt Indians who did not live upon a reservation. This course of dealing has placed a construction upon the Executive Order of November 4, 1873, and the Special Allotment Act of March 4, 1911, which these simple unlearned fishermen should be permitted to rely upon, for this court has

frequently held that Indian laws and treaties should be construed, not according to the technical meaning of their words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Jones vs. Meehan*, 175 U. S. 1. *United States vs. Winans*, 198 U. S. 381.

We believe that the District Court, in dealing with the Quinaielt Indian Reservation and the right of petitioners to allotments on such reservation, was justified in following the opinion of the Solicitor for the Department of the Interior which that Department has consistently followed since 1916 and under which it has allotted upon the same reservation, since that time, seven hundred to eight hundred Indians, whose qualifications to receive allotments upon the Quinaielt Reservation are exactly the same as those of petitioners in these actions. We further believe that the construction placed upon the Executive Order of November 4, 1873, and the Act of March 4, 1911, by the District Court is the only one sustainable consistently with the previous and present policy of the Department of the Interior in dealing with this reservation. The District Court's interpretation of the meaning of the term "treaty" is that always placed upon it in the past by the officers of the Department of the Interior and it should not be abandoned now to the prejudice of these particular petitioners. The change of policy now sought to be imposed by the Depart-

ment falls far short of that essential good faith on the part of the United States which is required in dealing with a class of people who have been more or less considered as wards of the Government and who, at least as far as these rights are concerned, sustain that relationship now.

The remaining points have been sufficiently presented in the petition.

Respectfully submitted,

OVERTON G. ELLIS,
A member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington.

*STUART H. ELLIOTT,
H. G. ROWLAND,
DIX H. ROWLAND,
Counsel for Petitioners,
Tacoma, Washington.

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*Stuart H. Elliott, counsel above, is not an Indian and is in no manner related to any of the petitioners herein.

APPENDIX

A—TREATY WITH THE QUINAIELT, ETC., 1855-1856:

"Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

"Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyd into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and

will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable * * *"

(Indian Affairs Laws and Treaties. Kappler, Vol. 2, page 719, 12 Stat. 971.)

B—ACT OF MARCH 3, 1871:

"No Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

(16 Stat. 566, R. S. 2079.)

C—THE EXECUTIVE ORDER OF NOVEMBER 4, 1873:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians"—"and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory"—"be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast."

(Kappler, Ind. Laws & Treaties, Vol. 1 (2nd Ed.), pp. 923-924.)

D—ACT OF FEBRUARY 8, 1887 (GENERAL ALLOTMENT ACT):

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impair-

ing or otherwise affecting the right of any such Indian to tribal or other property."

(24 Stat. 388) (25 U. S. C. A. 331).

E—ACT OF JUNE 7, 1897:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right."

(30 Stat. 90.) (25 U. S. C. A. 184).

F—ACT OF MARCH 4, 1911:

"That the Secretary of the Interior be, and is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-fifth, eighteen hundred and fifty-six, and who may elect to take allotments

on the Quinaielt Reservation rather than on the reservations set aside for these tribes;

Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

(36 Stat. 1345).

G—ACT OF JUNE 2, 1924:

"All Indians born within the territorial limits of the United States are declared to be citizens of the United States. The granting of citizenship to Indians shall not in any manner affect the right of any Indian to tribal or other property."

(c. 233, 43 Stat. 253).

H—SECTION 324 OF THE ALLOTMENT REGULATIONS 1904 OF THE INTERIOR DEPARTMENT:

"Under Section 324 of the Regulations, 1904, and amendments thereto, children born to properly enrolled members of the tribe are entitled to enrollment with their parent or parents. This includes cases where the mother is an Indian woman married on or prior to June 7, 1897, to a white man and living apart from the tribe, and the mother was recognized by the tribe as belonging thereto by blood, or was so recognized at the time of her death. It is not essential to enrollment that the children be so recognized

nor that they be born on the reservation or among the Indians."

Act of June 7, 1897 (30 Stat. 90); and Solicitor's opinion of June 16, 1924, in the case of *Addie Prickett et al* (50 L. D., 554).

I—LETTER FROM THE COMMISSIONER OF INDIAN AFFAIRS UNDER DATE OF JANUARY 19, 1914:

"M. Peter E. Jackson,
"Port Gamble, Wash.

"..... .

"As delegates of the tribes, these two Indians were further advised that under the general allotment act we are confined to a given number of acres of agricultural or grazing lands, and that such law did not contemplate the allotment of lands chiefly valuable for timber purposes; that timber valuable for commercial purposes was regarded as a tribal asset, to be administered for the benefit of the tribe at large rather than given to individual Indians by an allotment of land in severalty. It was stated, further, that the office hoped to market this timber at a satisfactory price, and, when the timber had been removed, to allot the lands to Indians then found entitled, according to their character and value for agricultural and grazing purposes.

"Inadequate transportation facilities within and adjacent to the Quinaielt Reservation renders it difficult to find a ready and satisfactory market for the valuable timber there, and until these conditions are improved, or until the price of lumber per thousand feet increases materially, it is doubtful whether it would be wise to dispose of this timber in the immediate future. If by holding on for two or three years longer the price per thousand feet can be doubled, it will augment greatly the income of the Indians from this tribal asset.

"Allotments have heretofore been made to some 690 Indians within the Quinaielt Reservation, covering, in the aggregate, some 54,989 acres. A special allotting agent was on this reservation with a view of continuing the work there, but owing to the number of Indians entitled, and the fact that practically all the agricultural and grazing lands had theretofore been allotted, it became necessary to suspend field operations until the timber on the tribal lands can be disposed of.

"

"(Signed) E. B. MERITT,
"Assistant Commissioner."

J—OPINION OF HONORABLE JAMES M. DIXON, FIRST ASSISTANT SECRETARY OF THE INTERIOR, IN

CASE OF FRANCIS C. MOUNTS, ET AL, V. THE UNITED STATES (NO. 385 EQUITY, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION):

Address Reply to
"The Attorney General
and refer to Initials and Number:
SWR-M
90-2-11-143 A. L.

RECEIVED
Office of U. S. Attorney
Nov. 6, 1929.
Seattle, Wash.
Ref. to PCR:FEB

DEPARTMENT OF JUSTICE
Washington, D. C.
November 1, 1929.

Anthony Savage, Esq.,
United States Attorney,
Seattle, Washington.

Re: FRANCIS C. MOUNTS ET AL, V. UNITED STATES, No. 385 Equity

Sir:

There is transmitted herewith copy of a letter dated October 21, 1929, from the First Assistant Secretary of the Interior, relative to the above-entitled matter, which letter is self-explanatory.

As you will observe, the Interior Department has arrived at the conclusion that the plaintiffs in this case are entitled to enrollment and allotment upon the Quinaielt Indian Reservation. In view of this, it is suggested that you proceed no further in the defense of this case, and close the matter in your file.

Respectfully,

For the Attorney General,

(Signed) SETH W. RICHARDSON
Seth W. Richardson
Assistant Attorney General.

Enc. 59257

RECEIVED
Office of U. S. Attorney
Nov. 8, 1929,
Tacoma, Wash.
Ref. to .....

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON

Oct. 21, 1929

The Honorable
The Attorney General.

My dear Mr. Attorney General:

Further reference is made to your letter of June 21, 1929, transmitting for a report a

photostatic copy of the bill of complaint in the case of *Francis C. Mounts et al v. the United States*, No. 90-2-11-743, in the United States District Court for the Western District of Washington, Southern Division.

On page 2 of the report to your Department it was stated that further facts would be obtained from the agency relative to the rights of the plaintiffs in this suit, and if it is found that they are entitled to the rights sought a recommendation would be made that the United States District Attorney be auhorized to end the suit by stipulation.

Investigation of this matter develops the fact that Frank Mounts, the father of the plaintiffs, was enrolled by adoption and his enrollment was approved August 30, 1909. The oldest of the plaintiffs is 19 years of age. It is clear, therefore, that all the plaintiffs were born after the adoption of their father into the Quinaielt Tribe of Indians. *It further appears that these people have never resided upon the Quinaielt Reservation.* However, it further appears that the father has never abandoned his tribal affiliation as he has always taken an active part in tribal affairs and often, though his residence is away from the tribe and his wife is a white woman, he has held tribal office and is now Vice President of the Quinaielt tribal council.

In view of the fact that the father of these children does not appear to have abandoned his tribal relations as shown by his position as a tribal officer, these children are entitled to enrollment and allotment on the Quinaielt Indian Reservation. It is therefore recommended that the proper United States District Attorney be instructed to take appropriate action to end the litigation already commenced in this case.

Had an application been properly made on behalf of these children and forwarded to this Department with a statement of all the above facts there would have been no necessity for the institution of a suit in this case.

A copy of this letter is being transmitted to the Superintendent Taholah Indian Agency as instructions to enroll and allot these plaintiffs.

Very truly yours,

(Signed) JAS. M. DIXON,
First Assistant Secretary

Filed in the United States
District Court, Western District
of Washington, Southern Division,
November 26, 1929.
Ed M. Lakin, Clerk
By E. Redmayne, Deputy.

FILE COPY

FEB 2 193

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1930

No. 141-154
35055-35068

HILARY HALBERT, JR., DOROTHY HALBERT HUBBLE; MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem;* and FIFTY-ONE OTHERS, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Petitioners

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The Puyallup Valley Tribune

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 141

HILARY HALBERT JR, DOROTHY HALBERT HUBBLE, MILDRED HALBERT, a Minor, etc., *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 142

RICH HALBERT, a Minor, by Fred P. Halbert, Guardian *ad litem*, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA

No. 143

VERNON SIDNEY HALBERT, a Minor, by Benjamin F. Halbert, Guardian *ad litem*, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA

No. 144

SIDNEY E. HALBERT, a Minor, by Sidney Seth Halbert, Guardian *ad litem*, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA

No. 145

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE and AMELIA PEERS ALDEN, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 146

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, etc., *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 147

MARY BARICHIO PETIT and NORRIS PETIT, ELLIS A. PETIT, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 148

DEWEY BARICHIO and LEDA E. BARICHIO, ROMIE D. BARICHIO, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 149

EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. ELLIOTT, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 150

CHAS. G. ELLIOTT JR, ANNA MARIE ELLIOTT, HENRY ELLIOTT, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 151

AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 152

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 153

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 154

MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. PROVOE, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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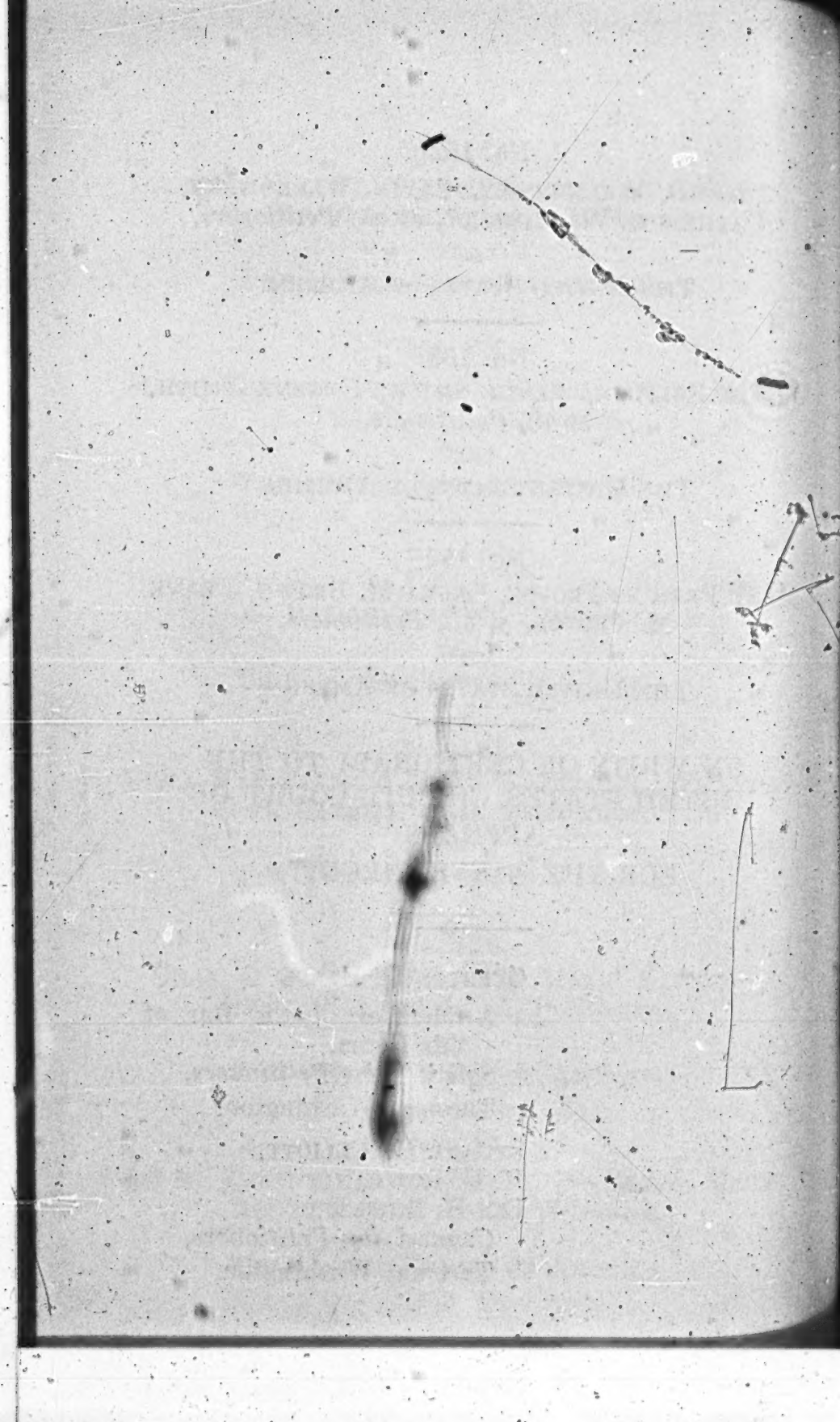

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

Nos. 141 to 154

HILARY HALBERT, JR., DOROTHY HALBERT HUBBLE, MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem;* and FIFTY-ONE OTHERS, *Petitioners,*

vs

UNITED STATES OF AMERICA, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

I.

OPINIONS OF COURTS BELOW

The opinion of the District Court is printed in the Record at pages 285 to 375, and is not reported in the Federal Reporter. The opinions of the Circuit Court of Appeals are printed in the Record at pages 633 to 699, and in the Federal Reporter in

38 Federal (2nd) pages 795 to 806. There are four opinions of the Circuit of Appeals:

United States vs. Halbert et al, and eleven other cases, No. 5922, 38 Fed. (2nd) 795, and page 633 of the Record.

United States vs. Provoe et al., No. 5922, 38 Fed. (2nd) 799 and page 653 of the Record.

United States vs. Walkowsky et al., No. 5922, 38 Fed. (2nd) 805, and page 646 of the Record.

United States, vs. Rolfson et al., No. 5922, 38 Fed. (2nd) 806, and page 650 of the Record.

II.

STATEMENT OF JURISDICTIONAL GROUNDS

These cases were begun in the United States District Court for the Western District of Washington, Southern Division, under and by virtue of the Act of August 15, 1894, (28 Stat. L. 305) as amended by the Act of February 6, 1901, (31 Stat. L. 760) and the Act of March 3, 1911, (36 Stat. L. 1167, 25 U. S. C. A., par. 345) which provides that:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any

allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper district court of the United States, etc."

The following cases sustain the jurisdiction of this Court under the above statute:

Leecy v. United States, 190 Fed. 289. (Appeal dismissed, 232 U. S. 731.)

Sloan v. United States, 118 Fed. 283. (Appeal dismissed, 193 U. S. 614).

Morrison v. Work, 266 U. S. 481.

Hy-yu-tse-mil-kin v. Smith, 119 Fed. 114, and 194 U. S. 401.

Payne v. United States, 264 U. S. 446, 284 Fed. 827.

The jurisdictional grounds are pleaded in each case. (R. 2, 20, 38, 56, 92, 109, 129, 150, 169, 190, 209, 227, 248, 267), and are admitted by the respondent. (R. 9, 27, 45, 63, 99, 117, 136, 158, 177, 198, 216, 235, 256 and 274).

The cases were all consolidated for the purposes of trial and appeal. (R. 376).

After a hearing before the trial court, the petitioners were allotted and at the same time seven of the plaintiffs were denied allotments. The respondent, the United States, appealed to the Circuit Court of Appeals all the cases in which allotments were granted. The Circuit Court of Appeals reversed the United States District Court in the cases involving petitioners. (R. 644). Petitioners filed a petition for rehearing, which on the 31st day of March, 1930, was denied. (R. 685).

Writs of certiorari were granted in these cases on October 13, 1930. (United States Supreme Court Advance Opinions 1930-31, No. 1, page 6) (R. 689 to 692, inclusive).

This Court has jurisdiction to review these Cases under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (43 Stat. 936).

The judgments of the Circuit Court of Appeals in all of the above cases were signed on February 24, 1930. The judgment of the Circuit Court of Appeals in each case may be found on the page number opposite the case number in the table below:

U. S. Supreme Court Number	District Court Number	Page of Record
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142	300E	671
143	301E	672
144	302E	673
145	307E	675
146	312E	676
147	320E	677
148	321E	678
149	324E	679
150	325E	680
151	326E	681
152	315E	682
153	314E	683
154	309E	684

All the above cases were combined in the Circuit Court of Appeals (9th Circuit) as Number 5922.

III.

STATEMENT OF THE CASE

The cases, in which writs of review have been granted and which are now before this Court, were begun in the United States District Court for the Western District of Washington, Southern Division. The reservation concerned is the Quinaielt Reservation in Grays Harbor County, Washington.

After a hearing before the trial court, the petitioners were allotted and at the same time seven of the plaintiffs were denied allotments. The respondent, the United States, appealed all the cases in which allotments were granted. The plaintiffs who were not allotted did not appeal. (Opinion of Trial Court, R. 285 to 375). The Circuit Court of Appeals granted the allotment of Lizzie Rolfson personally (R. 683) and of Archie Pellard conditionally (R. 674). The Circuit Court of Appeals reversed the United States District Court in the cases involving these petitioners. (R. 644, 649, 653, 669). Petitioners filed a petition for rehearing, which on the 31st day of March, 1930, was denied. (R. 685). All the petitioners are Indians.

Homes of Petitioners

All of the petitioners live adjacent to the Pacific Ocean in the region between the Quinaielt Reservation and the Columbia River. A considerable number live at Dahlia, near the mouth of the Columbia River, strictly an Indian fishing village; (R. 485, 488, 422, 425, 383, 384, 388, 394, 414, 417, 421, 548, 511, 514, 515); a small group lives at the little settlement of Oysterville (R. 495-542 etc.), and a larger group at the little settlement Bay Center on the Pacific Ocean. Bay Center, particularly, is still in a large degree an Indian settlement. (R. 569 to 574. 545 to 558, 495). One petitioner

lives just outside the Quinaielt Reservation at Moclips, the home of several members of the Quinaielt Council. (R. 597, 413). One lives on the shore of Quinaielt Lake (R. 398), which lake itself is within the reservation. Another group of petitioners lives at Oakville on the little Chehalis Reservation thirty miles east of Grays Harbor. Still another group of petitioners live in the town of Hoquiam on Grays Harbor, thirty miles from the Quinaielt Reservation. (R. 385, 393). Hoquiam would probably be called a white community at the present time. However, it was once an Indian village, (R. 392, 394), (Handbook of American Indians, Part I, p. 569) and the Quinaielt Indian Agency is now located there. (R. 382). Furthermore, many Indians live in Hoquiam. Thus it can be seen that the petitioners have not left the Indian country. A great many of the petitioners are fishermen (R. 398, 488, 508, 571, 572), and their mode of living is no different than that of the group which lives on the Quinaielt Reservation. (R. 388, 414). The petitioners, Alvin Smith and Eugene Smith (Case No. 153) may not come within the above general rule. They are working now outside of this region, but they lived with their mother, Lizzie Rolfson, on Grays Harbor all of their lives until Alvin Smith went away to the war. Referring to all petitioners, the trial court makes a general finding to this effect:

"They still cling together at and about the old haunts of the former tribal organization and are therefore tribes within the meaning of the Executive Order and the Act of March 1911." (R. 330).

The Indian situation in Western Washington is in many respects different from that of any other part of the United States (R. 500). Because of the uninhabitable condition of the Reservation none of the Indians for whom it was set aside have been placed upon it. Only a small group lives upon it or has ever lived upon it. In contrast with the Indians of many other parts, the Indians of this region have been by necessity self-supporting. A small group lives at LaPush (150 to 200), a few at the mouths of the Hoh (62) and Queets Rivers (62), another group at Taholah (150 to 200), at the mouth of the Quinaielt, but others live in towns and Indian setlements in Southwestern Washington. Most of these Indians are engaged in fishing or oyster gathering, but others work for the white man in lumber camps and saw mills.

Geographical and Historical Sketch

A reference to the geography and Indian history of Western Washington will aid greatly in understanding these cases. We believe the Circuit Court of Appeals in reversing these cases complete-

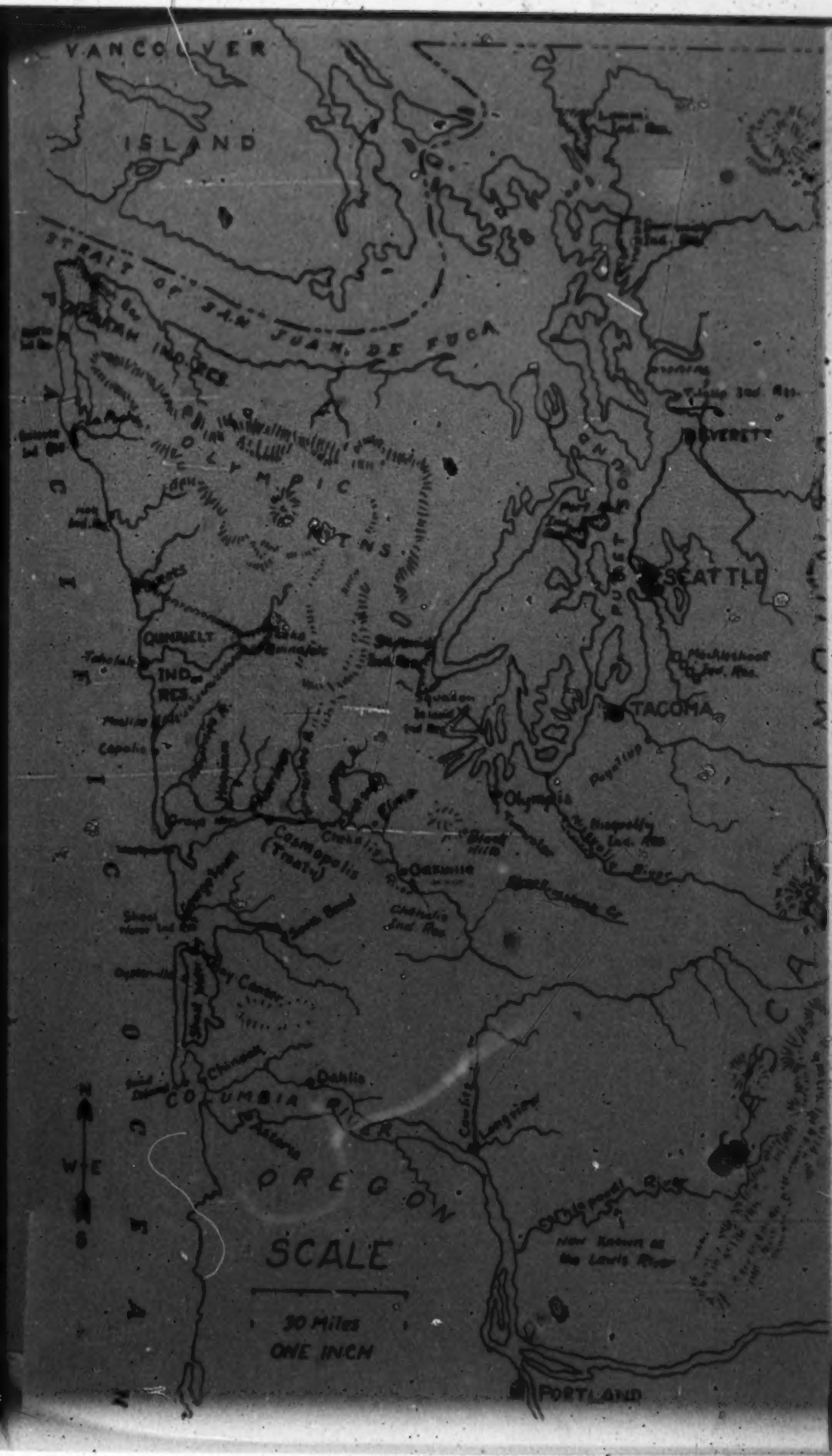
ly overlooked the peculiar physical condition of the Quiniaelt Indian Reservation and the history of these Indians as affected by that condition. The record is very clear as to the physical condition of the Quiniaelt Indian Reservation. The reservation is a heavily timbered area. Residence thereon is not possible until the land is cleared and fit for cultivation. (R. 383, 404, 426, 446, 500). The record furthermore contains so much testimony as to the history of these Indians, the dealings of the government with them, and of their past and present mode of living that it should not be necessary to go outside of it for the purposes of this sketch. However, if for the sake of completeness, we should go outside of the record, and make statements which are matters of common knowledge, we expressly request respondent to correct us in its brief if it is believed that any of these statements are inaccurate.

We are including herein a sketch map of Western Washington, for the purposes of illustration only, showing (1) the principal physical features of the region, (2) the location of the various Indian Reservations, (3) the locations of the homes of the petitioners, and a number of other places and physical features referred to in the record. This map was copied almost entirely from the official map of the Department of the Interior for

the year 1924 and in addition thereto is borne out by the record in the case.

The country with which we are concerned in these cases is that part of the State of Washington which lies between the Makah Indian Reservation or the Straits of Juan de Fuca on the north and the Columbia River on the south. Excepting the Olympic mountains, with which we are not concerned, the area is not mountainous. There are ranges of hills, probably the greater part is upland or hilly, but there are many valleys and swampy river bottoms through which flow rivers and streams of considerable size and volume, the principal of which is the Chehalis, along which river or its tributaries a number of the petitioners reside. It is a rainy country.

When the white men first came to this region they found it covered with forests, almost impenetrable because of the heavy underbrush. Travel through this humid jungle-like country was exceedingly difficult except along rivers, streams and ocean beaches. Most of the early travel was by canoe. (Swan's "Northwest Coast"). Wild game was not particularly plentiful and, because of the thick underbrush, was difficult to capture. But Nature had placed an abundance of fish in the streams, rivers and bays, so when these first white men came they found the region inhabited by a


VANCOUVER
ISLAND
STRAIT OF SAN JUAN DE FUCA
OLYMPIC
MTNS
QUINAILT
IND. RES.
Cosmopolis
(Treaty)
Chehalis
Oakville
Olympia
Squaxon
Ind. Res.
Tacoma
Mackleshoot
Ind. Res.
Tulalip Ind. Res.
EVERETT
SEATTLE
Nisqually
Ind. Res.
Chehalis
Ind. Res.
Chinook
Oahlis
COLUMBIA RIVER
Astoria
Longview
OREGON
Cathlapooyi River
New Known as the Lewis River
PORTLAND
SCALE
30 Miles
ONE INCH
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people who were fish eaters and "who drew their subsistence almost wholly from the water."

Because of the difficulty of travel, these inhabitants were not united under one leadership. In fact there was no real tribal organization at all comparable to that found in many other parts of the United States. (R. 547, 548, 554). A small village, or a group of families, or a single "family house" (Swan's Northwest Coast) at the mouth of this or that river or at the confluence of two streams was about the only form of tribal organization. It is true that the Indians of one locality went by a name to distinguish themselves from those who lived in other localities, usually taking the name of the river along which they lived. It is also true that those of one district in some instances spoke a somewhat different dialect from those of other districts, although the racial group or strain was Chehalis. (R. 547). (Handbook of American Indians, Part 1, p. 241). Individual Indians or medicine men sometimes called themselves chiefs, but it is almost certain that their sovereignty rarely, if ever, extended beyond the confines of their villages.

The Quileutes who lived to the north of what is now the Quinaielt Reservation belong to a different racial stock from those further south and they were much more warlike. (Handbook of American Indians, Part 2, p. 340) (R. 548). But many of the

Indians who lived on and around the Quinaielt River and many who lived south of there were accustomed to travel yearly to the Columbia River to fish. (R. 414, 417, 388, 548, 556, 508, 426, 421). This custom had probably gone on for generations and, as a result these Indians had more or less intermingled, and there is little by which to differentiate them. This affiliation was only of a general nature. There were, it is clear, differences between the more distant of these remnant tribes. (R. 419, 421). One witness at the trial testified that the Indians who lived 50 or 60 miles up the Chehalis River spoke a somewhat different language or dialect from that of the Indians near the mouth of the river (R. 419); another said their methods of fishing were different. Other witnesses testified, however, that they were more or less intermingled and that the names Upper Chehalis and Lower Chehalis were given by the whites for the sake of convenience. (R. 502, 557).

Although Article 5 of the Quinaielt Treaty (12 Stat. 971, Kappler's Indian Affairs, Laws and Treaties, 2nd Ed., Vol. II, p. 917) promised that $2500.00 should be appropriated for the purpose of placing the Indians on the reservation, there is nothing in the records to show that this sum was ever appropriated. Probably because of the Indian Wars, followed soon after by the Civil War, the matter was dropped. Certainly because of the

uninhabitable condition of the reservation, all the witnesses having testified that the reservation was not habitable until the land is cleared and made fit for cultivation, (Entire Record), the Indians for whom the Quinaielt Reservation was set aside were never placed upon it. The Interior Department, realizing that the Indians would starve to death on the uncleared reservation, or be a heavy expense to the government, was content to let them remain in their old haunts and to continue to make such living as they could by fishing or oyster gathering or by working for the white man. It might be added that this policy of the Department forced the Indians to live among the whites who in all cases have moved in and around them, and has naturally brought about a greater amount of intermarriage of whites and Indians than there otherwise would have been. (R. 422, 417).

The Indian Agency was for some years at Tacoma, Washington, later at Taholah, Washington, and for the last eight years at Hoquiam, Washington. (R. 459, 382, 399, 503). Since the days of the Quinaielt Treaty, which we will discuss below under the head of "Dealings of the Government With the Indians", the Indians of Southwest Washington, having no tribal organization, have more or less affiliated. (R. 325, 548). It is said that the Chinooks, the Shoalwater Bay, the Upper and Lower Chehalis, and to a somewhat less extent the

Cowlitz, are no longer distinct groups of Indians, that they have intermarried and intermingled to a much greater extent than they did before the coming of the whites. (R. 554). The statement that there is no tribal organization deserves some qualification. While only about 6 Indians of the 1400 allotted Indians live upon their allotments, about 150 live on the Quiniaelt Reservation. (R. 466). Almost all of these 150 live at the two fishing villages of Taholah and Queets (R. 383, 466). Most of them have fishing rights on the Quiniaelt River and make their living by fishing. These Indians, who because of their paramount fishing rights on the Quinaielt River are able to live on the reservation, have something akin to a tribal organization. It is under the supervision of the Indian Agent and all the tribal meetings are called by the Agent. It and Shoalwater Bay organization are described as more business organizations than tribal organizations. (R. 432, 554). At the same time there are 1000 other Indians who do not reside nor ever have resided upon the reservation although allotted thereon, who take no regular part in the affairs of these reservation Indians.

It should be mentioned that the very first visitors to Shoalwater Bay and the Columbia River described the Chinook and Shoalwater bands as being very numerous. (Journal of Lewis and Clark), (Adventures on the Columbia River by Ross Cox

1805, p. 156). In 1855, fifty years later, they are described as remnant bands of once powerful peoples, reduced to a sixth or less of their original numbers. (Swan's Three Years at Shoalwater Bay, p. 110, also p. 210). (R. 297, bottom of page). Whether it was the diseases, measles, smallpox, etc., brought by the white man that brought about the wholesale destruction of these people or contributed to it is not certain. It appears that the region north of Grays Harbor and particularly north of the now Quinaielt Reservation was less affected. North of Grays Harbor there are no harbors into which the early ships could sail and the region north of the reservation is practically untouched by the white men today.

Dealings of the Government With the Indians

It is well known to persons conversant with the history of the states of Washington and Oregon that on March 17, 1853, President Pierce appointed Isaac I. Stevens governor of the then Washington Territory and on November 25, 1853, he arrived in Washington Territory and established headquarters at Olympia. Among his other duties he was delegated to call meetings of the various tribes and bands of Indians in Washington Territory and make treaties with them for and upon behalf of the United States. (Life of Isaac I. Stevens by

Hazard Stevens, Vol. I, p. 448 et seq. Vol II, p. 1 et seq.)

Pursuant to this he called together the various tribes and bands of Indians and held councils with them. In Western Washington he effected the following treaties:

The Treaty with the Makah (12 Stat. L. 939); the Treaty with the Nisqually, Puyallup, etc., known as the Treaty of Medicine Creek (10 Stat. L. 1132); the Treaty with the Dwamish, Suquamish, etc., known as the Muckleteoh or Point Elliott Treaty (12 Stat. L. 927); the Treaty with the Sklallam, known as the Point No Point Treaty, (12 Stat. L. 933); and the Treaty with the Quinaielts, etc., (12 Stat. L. 971).

It was the intention of the Governor to include all Indian tribes of Western Washington and to provide for them in these treaties, and in accordance with such intention, Governor Stevens called together in council various associated and affiliated bands and tribes for the purpose of making treaties. He did not deal with each individual band but grouped them together into divisions in accordance with racial stock, language, custom, habits, affiliations, etc., and accordingly he summoned in council at the present site of Cosmopolis in the Chehalis River valley, on the 25th of February, 1855, 350 representatives of the following

tribes: Quinaielts, Chinooks, Upper and Lower Chehalis and Cowlitz. (Swan's Three Years at Shoalwater Bay, p. 337). (R. 386, 394). A census of the tribes represented at Cosmopolis showed the following members:

Lower Chehalis	217
Upper Chehalis	216
Quiniaelts	158
Chinooks	112
Cowlitz	140
Total	843

TERRITORY CLAIMED BY INDIANS AT COSMOPOLIS

It was the purpose of the Governor to have these various tribes cede their territory to the United States and, in exchange therefor, to create a large reservation for them somewhere between Cape Flattery and Grays Harbor, where they could all be placed. (Swan's Three Years at Shoalwater Bay, p. 344). The territory to be ceded commenced on the Pacific Coast at the divide between the Quaitso and the Hoh Rivers; thence east between the same along the line of the Puillachynte to the summit of the Coast Range; thence south along the line of Chem-a-kum and Skokomish tribes to the fork of the Satsop River; thence southeasterly along the line ceded by the Nisqually Indians to the

summit of the Black Hills and across the same to the banks of the Skookumchuck Creek; thence up said creek to the summit of the Cascade Range; thence along the range to the divide between the waters of the Cowlitz and the Cathlapoodl (Lewis) Rivers; thence southwesterly to the line of the Upper Chinook to the Columbia River and down the river to the sea.

Thus it appears that the proposal was to include all the lands upon the Pacific Coast from the Straits of San Juan de Fuca on the north, the Columbia River on the south, the Pacific Ocean on the west,, and the Cascade Mountains on the east, excluding, however, the land in the Puget Sound Basin which was covered by other treaties cited herein.

The Governor was eminently successful with the Indians of Northwest Washington, as was evidenced by the Makah or Neah Bay Treaties, and the Muckleteoh or Point Elliott Treaties. He also succeeded in making treaties with bands of Indians in Central Puget Sound, as is evidenced by the Treaty of Medicine Creek.

In his attempt to negotiate a treaty at Cosmopolis for the Southwestern Washington group above mentioned, he encountered unexpected obstacles and trouble. At first good progress was made, but finally, owing to some of the head men becoming intoxicated, it broke up in a row. (Swan's

Three Years at Shoalwater Bay, pp. 346 to 350), and he felt compelled to at least temporarily admit failure. It is said by James G. Swan, who was present at the Cosmopolis meeting, in his book "The Northwest Coast" that the Chinooks and other Indians of Southwestern Washington objected to being placed on a reservation "up north". "for the people up there were their enemies and they would fight and would all be killed." As a result thereof, many Indian tribes or bands were not named in the Quinaielt Treaty, so-called, and were never recompensed for their lands taken. The Indians finally signing the treaty at a later date were the Quinaielt Indians and the Quillehute Indians, the Quillehutes apparently having been taken in at a later date with the Quinaielts. They were apparently not contemplated at the meeting or treaty of Cosmopolis.

By the terms of the Quinaielt Treaty, a vast territory was ceded to the United States and a reservation of about 10,000 acres around the mouth of the Quinaielt River was reserved and established for the Quinaielt tribe.

The Indians who assembled at Cosmopolis, called there by Governor Stevens, were all fish-eating tribes of the Pacific Coast, subsisting principally on salmon, sturgeon, oysters and other sea foods. (Solicitor's opinion, R. 295-326). Their

languages were dialects of the Chehalis and they belonged to the Chehalis branch of the Salishan family. (Handbook of American Indians, Vol. II, page 418). These tribes were sought to be bound together by Governor Stevens in one treaty because of their many interests in common, among which were the fisheries between the mouth of the Quinaielt River and the Columbia River, and because they were mere remnants of once populous tribes, their numbers being so small that it would be uneconomical to provide a separate reservation for each tribe. (R. Exhibit No. 9).

That the Governor had accurately classified and grouped these Indians is borne out by the text of the Handbook of American Indians, Bureau of American Ethnology, Part 2, page 418, where it is stated under the head of Salishan Family:

> "Chehalis Group—embraced six dialects which show considerable variation. These are the Quinaielt and Quaitso of N. W. Washington, the Humptulip of the northern part of Grays Harbor, the Lower Chehalis of Grays Harbor and Shoalwater Bay, the Satsop east and northeast of Grays Harbor, the Upper Chehalis east of Shoalwater Bay, and the Cowlitz on the river of that name southward to the Columbia."

In Volume I of the same publication, p. 272,

it states that as early as 1855 the Chinook Indians were much mixed with the Chehalis, and that they have since completely merged, their language having become extinct.

This book was published by the Smithsonian Institution in 1910 and is the recognized outstanding authority on American Indians.

Although the meeting at Cosmopolis failed, Governor Stevens did not abandon his hope and intention, and the intention of the Indian Department to place the fish-eating Indians of the Pacific Coast on a reservation large enough to provide for their necessities, but such negotiations were stopped by the problems of the Yakima War which had broken out and demanded the undivided attention of the Government. In this war the Puget Sound Indians and various tribes of Indians east of the Cascade Mountains, both in Washington and Oregon, participated, and the Civil War was in the offing. The enlistment of the Governor in the Civil War took him away from the West and he was slain in an early engagement. (Life of Stevens, Vol. II, p. 485). All negotiations in reference to caring for the Indians of Washington were postponed until after the Civil War, when they were again resumed.

In the meantime Congress passed the Act of March 3, 1871, R. S. 2079, Appendix B), prohibit-

ing further treaties with Indian tribes and declaring that they should no longer be recognized as independent nations or tribes. The Interior Department and the Government agencies thereupon, in order to keep faith with the Indians of Southwestern Washington, contemplated in the original meeting at Cosmopolis, recommended and secured an executive order dated November 4, 1873, under the authority conferred on the President by Article 6 of the Quinaielt Treaty of 1855 and 1856, to consolidate the Quinaielt and Quillehute tribes and bands with other friendly tribes or bands. This executive order enlarged the Quinaielt Reservation to provide for these Indians and the fish-eating Indians of the Pacific Coast and other Indians in that locality. The reservation was thus enlarged from the original 10,000 acres to 224,000 acres and was thereupon set apart for the use of the Quinaielts, Quillehutes, Hoh and Quit and other tribes of fish-eating Indians on the Pacific Coast. (R. 436 and Plaintiff's Exhibit No. 9).

The Chehalis Reservation near Oakville has not been shown on the Department's maps in recent years. In 1864 it was set aside by the Secretary of the Interior. However, sometime after the promulgation of the Executive Order of November 4, 1873, it appears that it was abandoned. In the Handbook of American Indians, Vol. II, page 387, it is said:

Chehalis Reservation:

"Order of the Secretary of the Interior, July 8, 1864; Executive Order, Oct. 1, 1886. 471 acres set aside for school purposes; the residue, 3,753.63 acres, was restored to the public domain for Indian homestead entry. 36 Indians made homestead selections, covering all the land."

Respondent does not suggest that this reservation has any bearing on the issues in these cases. References to the Chehalis reservation may be found at the following record citations: (R. 441, 496, 538, 539).

Nothing further was done until the passage of the General Allotment Act of 1887. The question of allotting the reservation was taken up, and finally in 1905 the work began, and allotments were made to a large number of fish eating Indians on the Pa- Upper and Lower Chehalis, Chinook and other associated tribes, many of whom are the ancestors of these petitioners (R. 425, 437, 443, 503, 534, 502, 602). These allotments included members of all those tribes and bands which had gathered at Cosmopolis in 1855 in answer to the summons of Governor Stevens and they take in all the settlements around the Quinaielt River, Grays Harbor, Shoalwater Bay and some around the Columbia River. (R. 425-443).

On March 4, 1911, a special allotment statute was passed by Congress. This provided:

> "That the Secretary of the Interior be, and is hereby authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-fifth, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes;
>
> *Provided*, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed." (36 Stat. 1345) (Appendix "F").

This was the last legislation relative to allotment of the reservation.

MEANING OF ACT OF MARCH 4, 1911, DOUBTFUL

However, the local Indian Office and many Indians felt that the Act of March 4, 1911 (Appendix F) was not as clear as it might be in the expression "other Indians in Washington who are affiliated

with the Quinaielt and Quileute tribes in the Treaty of July 1, 1855, and January 25, 1856". They feared that it might some day be used to deprive the Indians, for whom the reservation was set aside, from their rights to allotment and might upset the entire previous policy of allotting the Quinaielt Reservation. As a result House Bill 22868 was introduced on April 2, 1912, to clear up the matter. (R. 320). The Indian Office at Washington thereupon gave its opinion January 4, 1913, (R. 315) which dispelled these fears and was so far satisfactory that House Bill 22868 was dropped. The relevant part of that opinion read as follows:

"The question may be seriously considered at this time whether the Act of March 4, 1911, supra, was necessary. That is, whether authority did not already exist under the treaties mentioned and the Executive Order of November 4, 1873, to allot on the Quinaielt Reservation Indians of the tribes specifically mentioned in the Act of March 4, 1911. It is not seen, therefore, how this Act can be construed or regarded as in abrogation of or placing any limitation on the rights of various so-called fish-eating Indians of the Pacific Coast to allotments on the Quinaielt Reservation. The act should be read in conjunction with the prior treaties and the

executive orders rather than using it as a basis for excluding from allotment on the Quinaielt Reservation members of the fish-eating tribes not specifically named in its provisions or who cannot be shown as clearly coming within the phrase 'or other tribes of Indians in Washington, who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's (300) correction), 1856'."

* * *

"House Bill 22868, introduced April 4, 1912, but which has not yet been referred to the Department for report so far as this Office has been advised, is designed to authorize allotments on the Quinaielt Reservation to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute and other fish-eating Indians in the State of Washington. In view of the treaties, executive orders and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary."

We will point out in the argument that, while the trial court held that the Indians of Southwestern Washington were affiliated with the Quinaielts

and Quileutes in the Treaty of July 1, 1855, and January 25, 1856, because of their part in the historically famous prior negotiations of February 25, 1855, it is unnecessary for this court to decide that question.

Opinion of Solicitor for Department of The Interior

The most important evidenciary document in these cases is the opinion of Alexander Vogelsang, Solicitor for the Interior Department (R. 295 to 326). This is in the form of a letter written September 12, 1916. Many Indians from all parts of Western Washington, including many belonging to the Puget Sound tribes who had been provided with large reservations, sought allotments on the Quinaielt reservation. The Solicitor for the Department examined all the correspondence relevant to the question and held that many of those tribes were not entitled to allotment. His conclusion is that only the Indians of those tribes or bands from the Makah Reservation on the north to the mouth of the Columbia River, and tribes affiliated with them are entitled to allotment (R. 324, 325). The trial court sets out this opinion of the solicitor in full (R. 295-326), and his analysis of it begins on page 326 of the Record.

History of Allotment of Quinaielt Reservation

Allotments on the Quinaielt Indian Reserva-

tion in Washington began in 1905 under the General Allotment Act of 1887. The first roll of 119 names was submitted in 1907, the second of 327 names in 1908, and the third of 300 names in 1910. Thus, 746 Indians were allotted on the Quinaielt Reservation before the passage of the Act of March 4, 1911 (See Appendix "F") (R. 437).

In 1908 the superintendent of the Quinaielt Indian Reservation accompanied by Commissioner of Indian Affairs made an investigation of the situation on the Quinaielt Reservation, and later the Superintendent, Commissioner of Indian Affairs and the Secretaryof the Interior, Mr. Garfield, held a conference in Washington when it was decided that, owing to the peculiar situation of the Quiniaelt Reservation, the scattered fish-eating Indians in Southwestern Washington should be recognized and allotted without residence (R. 499). Carrying out this policy, the Quinaielt and associated Indians living at Shoalwater Bay were allotted on the Quiniaelt Reservation in 1906 or 1908 to the extent of over 100, without applications. (R. 494). Trust patents were issued to them and the Superintendent of the Quiniaelt Reservation was sent to Shoalwater Bay to advise the Indians to accept their patents and to tell them that residence on the reservation would not be required of them (R. 494). Most of these Indians never resided on any

reservation. Among these allotted at that time are included the entire settlement at Bay Center, sixty miles from the Quiniaelt Reservation (R. 425, 426), most of who are ancestors and close relatives of petitioners (R. 542, 551, 553, 569, 571, 572, 575).

Since the above schedules were approved, 746 or 747 additional Indians have been allotted and such allotments approved by the Secretary. These allotments were made under the Act of March 4, 1911. Prior to the passage of the act, and subsequent therto, many Quiniaelts, Lower Chehalis, Upper Chehalis, Chinooks and some Cowlitz were allotted on the Quinaielt Reservation (R. 425, 437, 444, 503, 534, 602, 411). Of all the names on these schedules, only six ever lived on their allotment. (R. 446). Of all the 1400 Indians allotted, only 150 live on the Reservation (R. 466), these being at the fishing villages of Taholah and Queets (R. 383). The allotting on the Quiniaelt Reservation was discontinued after the filing of the schedule of 1910, as the Interior Department had decided that timber land was not allotable, and was not resumed for fifteen years thereafter, not until after the decision of this Court in the case of *Tommy Payne v. The United States*, in 1924, 284 Fed. 827, 264 U. S. 446. Allotment work was resumed in 1925 and this litigation ensued. Residence upon the Quiniaelt Reservation or any reser-

vation was not essential for allotment. See Executive Order of 1873, Act of March 4, 1911, and Allotment Instructions in Appendix "C" "F" and "H"; also testimony of Superintendent Johnson (R. 499). The Quiniaelt Reservation is a heavily timbered area. Residence thereon is not possible until the land is cleared and fit for cultivation. (R. 383, 404, 426, 500). As testified by Allotting Agent Roblin, the Act of 1887 did not require residence in order for an Indian to secure an allotment on a reservation (R. 443) (Excerpt from Act of 1887 in Appendix "D").

The Quiniaelt Indian Reservation, as originally surveyed and set apart, consisted of only 10,000 acres (R. 469). At the time of the treaty in 1855 and 1856 (see Treaty in Appendix "A"), the Quiniaelt Indians numbered only 158 (R. 386). The reservation was enlarged by the Executive Order of November 4, 1873 (see Appendix "C"), to nearly 224,000 acres. (Bureau of American Ethnology, Handbook of American Indians, Part 2, p. 388, Executive Order of November 4, 1873, in Appendix "C") (R. 436, 442 and 443). This Executive Order was promulgated under the terms of the treaty with the Quiniaelts and other Indians giving the President of the United States the right to combine the Indians in the treaty with other friendly bands and tribes of Indians, (see Article 6 of

Treaty in Appendix "A"), and "to provide for other Indians in that locality" and "other tribes of fish-eating Indians on the Pacific Coast." (See Executive Order of November 4, 1873, in Appendix "C").

It appears from the letter of the Superintedent of Indian Affairs for Washington Territory, in which he recommended this enlargement, that he thought the enlarged area contained more agricultural and grazing land than it actually did contain. (Exhibit No. 9). Because of the uninhabitable condition, no effort has been made to place upon the reservation the Indian bands and tribes for which it was enlarged and set aside. A few of the Indians already allotted who have resided on and near the borders of the reservation have held fishing locations on the Quinaielt River (R. 398, 476). The fish have been sold commercially. However, the Quinaielt River is not a large river as is the Columbia and this fishing industry on the Quinaielt, while limited, is able to provide a living for about 25 or 35 Indian families. The reservation was set aside to provide for about 2,200 Indians, giving each of them 80 acres (R. 442, 443).

Without indulging in argument, we will say that we could never understand why these few Indians who were able to make a living on the reservation should be more favored than the far greater

number who have been forced to make a living off the reservation. Possibly the Indian Department has heretofore held this view also (R. 499). The Act of March 4, 1911, fully protected the rights of these Indians living on the reservation by providing that allotments to the other Indians should be made "after allotments to the Indians thereon have been completed."

The Indian Department has looked forward to the day when the timber should be sold and logged off by large scale logging operations (Appendix "I"). This is the present situation and the reservation is being rapidly cleared of the timber.

If it were not for the allotment acts and the policy of the government encouraging the Indians to take on the habits and customs of civilized life, it would seem that as soon as the timber has been removed the next step would be to place on the reservation the Indians for whom the reservation was set aside. But with the allotment acts in force it is clear that the Indians should not be placed on the reservation as tribes or bands but that the individual members of these tribes or bands or remnants thereof should be given allotments. The purpose of this litigation is to determine what Indians should be allotted on the Quiniaelt Reservation.

All the petitioners come within the saving clause of the Act of June 7, 1897, (see Appendix

"E"), or are the children of Indian fathers, or are the children of Indian fathers and Indian mothers.

Tribes Whose Families Have Been Allotted By Respondent

The Indians who have heretofore been allotted lands in severalty on the Quinaielt Reservation without the necessity of their being adopted into the Quiniaelt tribe and without requiring residence on any reservation, are individual members of the following tribes and bands in that locality (Quinaielt Reservation) consisting of Quinaielt, Quileutes, Queets, Hohs, Upper Chehalis, Lower Chehalis, Chinooks, Cowlitz and mixed bloods of the above named tribes and bands, all fish-eating Indians of the Pacific Coast of Washington (R. 411, 412, 421, 426, 443, 445, 447, 448, 466, 476, 481, 493, 494, 495, 496, 498, 499, 500, 502, 503, 506, 526, 531, 534, 535, 551, 552, 553, 569).

It is agreed and stipulated that Lower Chehalis Indians are entitled to allotment on the Quinaielt Indian Reservation (R. 421).

It is stipulated by the parties in all the cases that the petitioners in each instance have made selections for allotment and that the allotments have been objected to by the Department (R. 528).

Names, Residence and Family Relationship of Petitioners

The first six petitioners in the first four cases, known as the Halbert children, are admitted to be the children of duly enrolled and allotted Indian fathers of the Quinaielt Reservation (R. 9, 27, 45, 63). The names of the first four petitioners were on the Quinaielt roll for several years and dropped without notice so far as the record discloses (R. 395, 396). Those petitioners live at Hoquiam, Washington, where the Quinaielt Agency is located and where their fathers and grandmother, Quinaielt allottees, have always resided, with the exception of the petitioner Rich Halbert, who lives within 200 feet of the boundary of the Quinaielt Reservation (R. 398).

The petitioners, Lulu M. Elliott, Sophie M. Elliott, Carolyn M. Elliott, Marion E. Elliott, Emma S. Elliott and Norma C. Elliott, are children of an Indian father and an Indian mother, both of whom are enrolled, recognized and allotted Quinaielt Indians (R. 131, 136), were born and reared at Dahlia, Wahkiakum County, Washington, their father is a fisherman, and the respondent has recognized, enrolled and allotted on the Quinaielt Reservation the father, mother, grandmother, fifteen uncles and aunts, and numerous cousins (R. 130, 137, 485, Plaintiff's Exhibit No. 10, 490). What

has been said about the last group applies to the appellees in cases 149 and 150, except that in these cases the petitioners are children of an Indian father and a white mother, the father being allotted on the Quinaielt Reservation. (R. 227, 234, 248, 255).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, are the children of Louise E. Henry, who was enrolled and allotted on the Quinaielt Indian Reservation. They live where they have always lived (R. 267, 273, 342, 490-491). This last group are children of a marriage between their Indian mother, Louise E. Henry, and a white man, *contracted in 1890* (R. 491).

The petitioners, Mary Barichio Petit, Norris A. Petit, Ellis A. Petit, are all offspring of an Indian father and Indian mother. Mary Barichio Petit is the daughter of Frank Barichio, an enrolled and allotted Quinaielt Indian, and Leda Givens, a woman of part Indian blood. Norris A. and Ellis Petit are children of this Indian woman and Paul Petit, a recognized and allotted Quinaielt. Petitioner Oscar Brignone is a grandson of Ellen Amelia Springer, Quinaielt allottee No. 595. The petitioner Dewey Barichio is a brother of Mary Barichio and the son of Frank Barichio, Quinaielt allottee. The wife of petitioner Dewey Barichio, and the

mother of petitioners, Romie D., Leda E. and Andrew B. Barichio, is Vinie Wilson, duly enrolled and allotted on the Quinaielt Indian Reservation. (R. 550 to 553, 569-573).

The Barichio and Petit families have lived on Shoalwater Bay, Washington, with the colony of Quinaielt Indians there residing, virtually all the members of which were allotted on the Quinaielt Indian Reservation prior to 1908 (R. 493-495, 498). This family is of mixed Quinaielt and Lower Chehalis blood, (R. 550-553), and under the stipulation (R. 421), its members should be allotted.

The petitioners, Rose Peers Pickernoll, Mabel Peers White and Amelia Peers Alden, are the children of an Indian father, Henry Peers, a Lower Chehalis Indian (R. 519), and an Indian mother, Judith Ducheney (R. 93, 98, 99), a Quinaielt Indian, a sister of Agnes Elliott, allotted on the Quinaielt Indian Reservation. Petitioner Rose Peers Pickernoll is the wife of an allotted Quinaielt Indian (R. 520). They live at or near Dahlia, Washington, strictly an Indian village, the original tribal habitat of their people (R. 520), and under the stipulation (R. 421), they are entitled to allotments.

The petitioners, Virginia, Alvin and Catherine Walkowsky, minors, are children of an Indian woman, Kate Walkowsky Weiss, a Quinaielt Indain, and a white man, John Walkowsky, whom she

married January 9, 1893. The petitoners are full brothers and sisters of Albert Walkowsky, Louise Walkowsky, Frank Walkowsky, Ida Walkowsky, Grace Walkowsky Griggs, Leonard Walkowsky, Rose Walkowsky and Kenneth Walkowsky, all of whom are duly enrolled and allotted upon the Quinaielt Indian Reservation (R. 521, 522). Petitioners live with their mother, Kate Walkowsky, at Oysterville on Shoalwater Bay, Washington, among that branch of the Quinaielt tribe heretofore referred to. Oysterville is a little settlement where the Indians make a living gathering oysters (R. 498, 521, 542). These petitioners are the offspring of a full blood mother, either Quinaielt or a Lower Chehalis by blood (R. 521, 542, 543, 546), and under the stipulation at page 421 of the record, are entitled to be allotted.

The petitioners Eugene Smith and Alvin Smith, are children of Lizzie Rolfson, allotted on the Quinaielt Reservation by the District Court and the Circuit Court of Appeals (R. 683), the latter court affirming the District Court by finding her to be a Lower Chehalis Indian. The Circuit Court of Appeals follows the stipulation of the lower court agreeing that Lower Chehalis Indians are entitled to allotment (R. 421). Eugene and Alvin Smith were born of a marriage of an Indian woman, Lizzie Rolfson, and a white man, said *marriage*

having been *solemnized* in the year *1887*. The petitioners were born, reared and lived most of their lives at Hoquiam, Washington, where their mother now lives (R. 391 to 393, 472-476), in the original tribal habitat of their ancestors.

The petitioners, Mary Francis Provoe, Laura M. Brown, John W. Provoe, Frank M. Provoe, Rosa H. Garrard, Sarah Spencer, Isabelle R. Rainey, William A. Provoe and Raymond A. Provoe, are members of the Chehalis tribe of Indians of which the Quinaielt is a branch, and are all fish-eating Indians of the Pacific Coast, residing in Southwestern Washington in the vicinity of the Quinaielt Reservation. Several of them live on the little Chehalis Reservation, near Oakville (R. 586-590, 596-600). It should be noted that the expression "fish-eating Indians" is used in the Executive Order of November 4, 1873 (Appendix "C" hereto), and is defined on page 298 in the Solicitor's opinion (R. 295-326). Mary Francis Provoe was married to an Indian, David Provoe, in 1870, who was the father of the above named petitioners (R. 587, 588). Petitioners were recognized as belonging to the Quinaielt tribe in 1912 by an unanimous vote of the Quinaielt council (R. 586, 587).

The petitioners, while not living within the area ceded in the Quinaielt and Quileute treaty, do live

within the area contemplated in the prior negotiation of February 25, 1855. Two of the petitioners, Rich Halbert and Sarah Spencer, live within the area ceded by the Quinaielt treaty (R. 398, 597).

Findings of District Court Not Questioned by Circuit Court of Appeals

The decisions of the Circuit Court of Appeals in these cases do not question the findings of the trial court as set forth in the memorandum decision of District Judge Cushman (R. 285) as to the family relationship, residence or the tribal relationship of the petitioners, nor do they, nor does the record, question the enrollment, recognition and allotment of numerous members of the families of peitioners, nor do they question the findings of the District Judge as to the date of the several marriages of petitioners' parents. The decisions of the Circuit Court of Appeals are based solely upon the questions of non-residence on an Indian reservation, the application of the Act of 1897 and the Act of March 4, 1911, to the cases, and the lack of tribal affiliation, and seem to carry the idea that the record does not show that petitioners exhausted their efforts with the Secretary of the Interior before suing for their allotments (R. 669). The evidence in these cases and the express stipulation of the parties show that the petitioners did everything on their part to secure their rights before resorting to the Courts.

Stipulation of Counsel (R. 528). Surely nothing unreasonable should be expected of these Indians in this respect, and the fact that respondent is opposing these allotments, on grounds denying their legal right to allotment, shows that no such technical contention has merit.

The decision of the Circuit Court of Appeals does not pass upon the fact that these petitioners have never had an opportunity to live on any reservation, but in fact have been denied that right, and that every complaint contains the following allegation:

> "That notwithstanding all of the facts hereinbefore alleged, the defendant, its officers and agents, have unlawfully failed, neglected and refused to allot the said land to the plaintiffs herein. . . . and have denied and excluded, and still deny and exclude plaintiffs herein from said land, and have refused and still refuse to let the said plaintiffs go upon or reside upon said lands or any portion thereof; that said plaintiffs are entitled to have said lands so selected allotted to them and desire that the same be allotted to them and that their rights be recognized and that they may be permitted to go upon, live upon, cultivate and improve said lands as their homes,"

showing a willingness on the part of the petitioners

to go on the reservation and make their homes thereon (R. 6, 10, 24, 25, 28, 42, 43, 46, 60, 61, 64, 96, 99, 114, 118, 133, 134, 137, 154, 155, 158, 173, 174, 177, 178, 194, 195, 198, 213, 214, 217, 231, 232, 236, 252, 253, 256, 270, 271, 274-275). The allegations just quoted so far as concern the facts stated, are in substance admitted by the answers. (R. 10, 28, etc.).

Nor does the Circuit Court of Appeals pass upon the fact that the Department has at all times told the Indians of Southwestern Washington that they could continue to live off the reservation and would thereby in no way jeopardize their rights on the reservation given them by the Executive Order of November 4, 1873, and the Act of March 4, 1911, (R. 494, 499). (Appendix "C" and "F"). Furthermore, that the Court does not pass upon the effect of the inordinant delay of the government in allotting the Quinaielt Reservation. The General Allotment Act was passed in 1887. Nor does the Circuit Court of Appeals attempt to construe the Executive Order of November 4, 1873 (Kappler's Ind. Affairs, Vol. 1, 2nd Ed. pp. 923-924), (Appendix "C"), or pass upon its effect. (R. 668).

IV.

SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals erred in holding that petitioners are not entitled to allotment, although it appears that petitioners are either Quinaielt Indians or other fish-eating Indians of the Pacific Coast contemplated by the Executive Order of November 4, 1873, and notwithstanding the fact that the Quinaielt Reservation was enlarged from 10,000 acres to 224,000 acres, especially to provide for them, and although petitioners, at the time of applying for allotment, lived in the original tribal habitat of their ancestors, where many members of their families have been allotted, and although petitioners have been denied by respondent the right to go upon or reside upon the reservation.

2. The Circuit Court of Appeals erred in applying to petitioners the rule of necessity of prior residence as a condition to allotment on the Quinaielt Reservation, which is a heavily timbered area and unfit and unsuited for a home until the land is cleared.

3. The Circuit Court of Appeals erred in holding petitions to be without the right of allotment because of non-residence on the Quinaielt Indian Reservation, such reservation being specifically covered by an executive order which provides for

other Indians in that locality, and there being a specific act of Congress expressly providing for allotments from surplus land *after allotments to Indians on such reservation have been completed.*

4. The Circuit Court of Appeals erred in refusing to hold that petitioners who are children of an Indian woman and a white man whose marriage occurred prior to the passage of the Act of June 7, 1897, are entitled to allotment, the fact being that petitioners and their mother were and are now living in their original tribal habitat and in the same place where such Indian mother was recognized, enrolled and allotted as a Quinaielt Indian.

5. The Circuit Court of Appeals erred in applying the Act of June 7, 1897, to such of petitioners as are children of an Indian father who was duly recognized, enrolled and allotted as a Quinaielt Indian, and in refusing to hold that said Act of June 7, 1897, only applies to the children of an Indian woman and a white man.

6. The Circuit Court of Appeals erred in applying the Act of June 7, 1897, to such petitioners as are children of an Indian father and an Indian mother, where either the father or mother or both were duly recognized, enrolled and allotted Indians of the Quinaielt Indian Reservation, and in refusing to hold that said Act of June 7, 1897, applies

only to the children of an Indian woman and a white man.

7. The Circuit Court of Appeals erred in refusing to consider material the facts that the delay in allotting the reservation was caused by the unlawful acts of the respondent and its officers and representatives, through no fault of the petitioners, and that, by reason of such delay, petitioners were forced to live and work away from the reservation at some gainful employment.

8. The Circuit Court of Appeals erred in holding that said petitioners are without the right of allotment on the Quinaielt Indian Reservation for the reason that petitioners have in a measure adopted the habits and customs of civilized life by living in mixed white and Indian communities off the reservation, the sites of which communities are the original habitat of the tribe or band to which their progenitors belonged.

9. The Circuit Court of Appeals erred in denying petitioners rights to allotments of land on the Quinaielt Reservation on the ground that only the descendants of the tribes and bands of Indians who signed the treaty of 1855 and 1856 are entitled to allotment on this reservation, notwithstanding that the special act of Congress, the Act of March 4, 1911, (See Appendix "F"), expressly provides for allotment to "*other tribes of Indians in Wash-*

ington" who are affiliated with the Quinaielt and Quillehute Indians in this treaty after allotments to Indians on the reservation have been completed.

10. The Circuit Court of Appeals erred in holding that certain of petitioners who are citizens of the United States are by reason thereof not entitled to allotments of land on the Quinaielt Indian Reservation (R. 651).

11. The Circuit Court of Appeals erred in holding that children of duly recognized, enrolled and allotted Quinaielt Indians must be adopted into the Quinaielt tribe before being entitled to allotments of land on the Quinaielt Indian Reservation (R. 652).

Cases Herein to Which Each Specification of Error Applies

(a) Of the above Specifications of Error, Numbers 1, 2, 3, 7, 8, 9 and 10 are made for and are applicable to the cases of all the petitioners in all the cases herein consolidated for trial and appeal.

(b) Specification of Error Number 4 is made in behalf of, and is applicable to, the case of the petitioners in the actions wherein Virgina Walkowsky, et al, are petitioners; to the case wherein Agnes Rubens, et el., are petioners; and to the case wherein Alvin Smith, et al., are petitioners.

(c) Specification of Error Number 5 is made in behalf of and is applicable to the case of the petitioners in the actions wherein Hilary Halbert, Jr., et al., are petitioners; to the case wherein Rich Halbert is petitioner; to the case wherein Vernon Sidney Halbert is petitioner; to the case wherein Sidney Seth Halbert is petitioner; to the case wherein Edna May Elliott, et al., are petitioners; and to the case wherein Charles G. Eliott, Jr., et al., are petitioners.

(d) Specification of Error Number 6 is made in behalf of and is applicable to the case wherein Lulu M. Elliott, et al., are petitioners; to the case wherein Mary Barichio Petit, et al., are petitioners; to the case wherein Dewey Barichio, et al., are petitioners, and to the case wherein Rose Peers Pickernoll, et al., are the petitioners.

(e) Specification of Error Number 11 is applicable to all the cases which were combined for the purpose of trial and appeal, excepting the case in which Mary Francis Provoe, et al are petitioners, and in the case in which Rose Peers Pickernoll, et al., are petitioners.

V.

ARGUMENT

INTRODUCTION

Petitioners claim that they are entitled to an allotment of 80 acres of land each upon the Quinaielt Indian Reservation under and by virtue of:

1. The Quinaielt Treaty of July 1, 1855, and January 25, 1856. (Kappler's Ind. Affairs, Vol. II, p. 719).

2. The Executive Order of November 4, 1873. (Kappler's Ind. Affairs, Vol. 1, pp. 923-924).

3. The Act of June 7, 1897. (30 Stat. L. 60-90, 25 U. S. C. A., 184).

4. The Allotment of March 4, 1911, (36 Stat. L. 1345).

5 The opinion of the Solicitor for the Interior Department dated September 2, 1916. (Exhibit No. 9). (R. 295-326).

6. The allotment instructions of the Interior Department, Section 324 of 1904, with amendments thereto. (Appendix "H").

The trial court so held, and in his memorand-

um opinion clearly outlines the reasons therefor. (R. 285-375).

The Circuit Court of Appeals reversing the trial court held petitioners were not entitled to allotment for the reasons:

1. That petitioners did not live upon the Quinaielt Reservation, nor did they live upon any Indian Reservation.

2. That they were citizens of the United States and consequently not entitled to allotments of land on an Indian reservation.

3. That being citizens of the United States, though Indians, they must be adopted into the Quinaielt tribe.

4. Respondent contends that the Act of March 4, 1911, (Appendix "F"), supersedes the Executive Order of November 4, 1873 (Appendix "C"), and permits allotment to members of only the tribes specifically named in the Act, and excludes members of the other tribes or bands provided for in the Executive Order. The Circuit Court of Appeals does not definitely pass on this contention.

General Argument

These are difficult cases to present clearly to

an appellate court. . 16 cases, comprising originally 63 applications for allotments on the Quinaielt Indian Reservation of Washington were combined for purpose of trial and later for appeal. It was necessary to take a very large amount of testimony relative to the ancestry and affiliation of the Indian applicants, the early history of the country, and the policy and procedure of the Interior Department. The testimony was frequently conflicting, though in the main it can be reconciled. Before a judge, a pioneer in the State of Washington, who had tried many similar cases, who had a thorough knowledge of the Indians of Washington and of their history, and before whom many of the witnesses had appeared in other trials, the presentation was not so difficult. Nevertheless, the trial judge demanded a complete transcript of the record and took the cases under advisement for 6 months before he rendered his opinion, allotting petitions and denying allotments to 7 of the applicants.

So voluminous and in some places so contradictory is the record that its interpretation is subject to the same danger as is the piecemeal interpretation of the Bible. The appellant's (now respondent) brief before the Circuit Court of Appeals consisted very largely of excerpts taken here and there from the testimony and it was argued that, because the opinion of the trial court was not always in ac-

cord with these excerpts, the trial court erred in granting these allotments, a conclusion certainly not borne out by the record in its entirety. Particularly de we believe that an erroneous impression was given with regard to the amount of Indian blood of some of the petitioners. This we will speak of later.

At the very outset we wish to correct a very serious misconception, one which we feel must have influenced the Circuit Court of Appeals in reversing these cases. The misconception is in regard to the equities of petitioners. Respondent, after its own summary of the evidence, concluded its Circuit Court of Appeals brief as follows:

> "These are equity cases, and the whole fabric thereof, as fashioned below, is here in its constituent threads for analysis and review."

"The whole fabric of those cases," as therein summarized, consisted of parts of the testimony carefully selected so that an altogether incorrect picture of the equities was given.

We are reluctant to criticise a court of such high standing as the Circuit Court of Appeals for the Ninth Circuit. Nevertheless, we are convinced that these cases were given but a cursory examination and hasty treatment by that Court. Whether or not that treatment was the result of miscon-

ception as to the equities, we do not know. As evidence of the hasty treatment, we cite the case of the children of Kate Walkowsky (No. 152) wherein the Court finds in its opinion that Mrs. Walkowsky was an Indian whose mother was of the Wynooche band of the Lower Chehalis and her father was a full blood Chinook, and then proceeds to decide the question of the rights of the children to allotments on the ground that she, Mrs. Walkowsky, was a half-blood! (R. 648). In fact, it is admitted on page 522 of the record that Mrs. Walkowsky's mother and father were both full blood Indians! This glaring error was not corrected even after it was called to the Court's attention in our petition for a rehearing. After finding in the opinion that her mother was of the Wynooche band of the Lower Chehalis, the Court proceeds to deny her children on the ground that her mother's tribe was the Chinook. And these half-blood children were born after Mrs. Walkowsky's adoption into the Quinaielt tribe! Even this adoption was not necessary for her allotment (R. 448). The Circuit Court of Appeals says she is not a Quinaielt by blood but only by adoption. Her mother was a Lower Chehalis, which tribe was enrolled with the Quinaielts and by stipulation entitled to allotment (R. 421). She herself is a full blood Indian and the Chinooks, the tribe of her full blood Indian father, are fish-eating Indians of

the Pacific Coast, living between the mouth of the Columbia River and Shoalwater Bay, and are entitled to allotment under the opinion of the Solicitor for the Interior Department (R. 295-326).

In the Rolfson case, after the trial court found that Lizzie Rolfson lived and was associated with the Indians, and was herself a recognized member of the Lower Chehalis band or tribe (R. 362), the Circuit Court of Appeals denied allotments to her children born of a marriage contracted in 1887, a ruling directly contrary to the decision in the case of *Oakes et al. v. United States*, 172 Fed. 305.

Again in the Walkowsky case (R. 649) the Circuit Court of Appeals quotes as authority that part of the case of *Pape vs. United States*, 19 Fed. (2nd) 219-220:

> "We find no authority to sustain the construction that, when an Indian woman married a white man after the act of 1897," etc.

The petitioners in this case were born of a marriage contracted on January 9, 1893! (R. 521).

In the decision in the Provoe case herein (R. 666) (Case 154), the Circuit Court of Appeals says:

> "We conclude that the Chehalis Indians, both Upper and Lower, and the Cowlitz were not af-

filiated with the Quinaielt and Quileute tribes within the meaning of the Act of Congress of March 4, 1911, supra." 38 Fed. (2nd) 804, (R. 666).

Yet immediately thereafter the Court states: "nor do we wish to be understood as determining whether or not Upper Chehalis Indians are provided for by the proclamation." (Executive Order of November 4, 1873 (Appendix "C") which enlarged the Quinaielt Reservation to 22 times its original size for the "Quinaielt and Quileute Indians" and "other Indians in that locality" and for "other tribes of fish-eating Indians on the Pacific Coast.") (Part in parenthesis ours).

In other words, the Quinaielt Reservation may have been enlarged and set aside for the fish-eating Indians on the Pacific Coast, but these Provoes, though they belong to those tribes, though they are Indians on both sides of the family, and though most of them live on the little one-section Chehalis Reservation at Oakville, are not entitled to allotment on the Quinaielt Reservation which the court in effect says may have been set aside for them.

The Court denies the great portion of the petitioners solely on the ground of non-residence on an Indian reservation, in spite of the fact that of the 1400 or more Indians already allotted 1000

have never resided on an Indian reservation (R. 466, 383), nor have their ancestors, and in spite of the fact that their fathers or mothers or both fathers and mothers are enrolled and allotted on the Quinaielt Reservation. With peculiar inconsistency the Circuit Court of Appeals then proceeds to allot Lizzie Rolfson and Archie Pellard, non-reservation Indians whose parents and ancestors, so far as the record shows, never resided on an Indian reservation. This is more than counsel are able to understand.

There are many other errors and inconsistencies, the greatest being the complete disregard of the peculiar local situation and allotment history.

But as to the equities, we can say, without resorting to unjustified sentiment, that the Indians of Southwestern Washington have been more miserably treated than any group of Indians in the United States. A vast and valuable territory extending from the Olympic Mountains to the Columbia River on the coast of Washington was taken from them and they were in no way compensated for it. They once owned the oyster beds in Grays Harbor and Shoalwater Bay but the whites own them now. They once fished the bays and rivers at will but their rights to so fish, which the Indians believed were protected for all Indians by the many treaties with the other tribes of Washington, were construed to

mean only during the fishing seasons determined by the State Game Commissioner. *State v. Towessnute*, 89 Wash. 478, *State v. Meninock*, 115 Wash. 528.

It is true that the Cowlitz, Chinook, Shoalwater (Chehalis) and Chehalis Indians refused to sign the treaty at Cosmopolis because the tribes to the north were their enemies and they thought if they went up on a reservation in the Quinaielt country they would all be killed. But James G. Swan, whose fascinating description of the Cosmopolis negotiations is the one original authority on the subject, throws more light on these negotiations. He quotes the speech of Narkarty, one of the Chinook chiefs:

> "We are proud that our great father in Washington thinks of us. We are poor, and can see how much better off the white men are than we are. We are willing to sell our land, but we do not want to go away from our homes.
>
> "Our fathers, and mothers, and ancestors are buried there, and by them we wish to bury our dead and be buried ourselves. We wish, therefore, each to have a place on our land where we can live, and you may have the rest; but we can't go north among the other tribes. We are not friends, and if we went together we should fight, and soon we would all be killed."

And then Judge Swan continues:

"The governor certainly erred in judgment in attempting to place five different tribes on the same reservation; but his motive was, that they were so few, being mere remnants of once powerful bands, it would be better to have them concentrated at one point. They, however, did not think so; their ancient prejudices were as strong as ever, and they knew they could never agree to live together. They were willing to concentrate at a given point on their own lands, and it is a pity that the governor did not see the benefit that would arise by their so doing. A hundred Indians, all that remained of the Chinook tribe, if located at one point, would be in nobody's way, and certainly there is plenty of room in their possessions. So of each of the other tribes."—(Three Years at Shoalwater Bay, By James G. Swan, p. 338).

Was the refusal to sign the treaty so unreasonable that these tribes should lose all their rights forever?

In the years that followed the treaty the white men moved in and rapidly took the lands which once belonged to these Indians, under the authority of Congress. (Oregon Donation Land Act, September 27, 1850. [9 Stat. L. 496]). But the coming of the

whites did bring its advantages. With the more stable government it soon became safe to place these once somewhat hostile tribes on the Quinaielt Reservation and to thus fulfill Governor Stevens's original desire. So after the Act of March 3, 1871, (16 Stat. 566, R. S. 2079), (Appendix "B") forbade the making of further treaties with Indian tribes, the Executive Order of November 4, 1873, (Appendix "C") was promulgated enlarging the Quinaielt Reservation to 224,000 acres, for the use of the other fish-eating Indians on the Pacific Coast in addition to the tribes therein mentioned, thus remedying the above injustice. In spite of the Solicitor's opinion of September 2, 1916, (R. 295-326) respondent and the Circuit Court of Appeals would have us believe that the Quinaielt Reservation was enlarged from 10,000 acres to 224,000 acres to provide for 44 Ozette Indians, as outlined in its opinions (R. 638, 639, 640).

Fifty-seven years have elapsed and these tribes have not been placed upon the Quinaielt Reservation. Forty-three years have elapsed since the passage of the General Allotment Act of February 8, 1887, and the reservation is scarcely more than half allotted. There has been delay after delay. After allotment work was started in 1905 (R. 437) it was stopped in 1910 (R. 428, 437, 539) because the Department ruled that timber land was not

allotable. It was not resumed until 1925, after the case of *Tommy Payne v. United States*, 284 Fed. 827, 264 U. S. 446, was decided, after which this litigation was begun. All other reservations in Western Washington had been allotted many many years before (1890 to 1912). If the Court will but refer to the reports of the Superintendent for the Quinaielt Agency for the years 1891 to 1900, it will be seen how the Indians were literally begging to be given allotments thirty or forty years ago. And in all these years the whites have moved in and around these Indians, and the tribal organizations of these fish-eating Indians have slowly and gradually broken down. Those of the Quinaielts have been kept up only by the local field officials. (R. 409, 410, 538). And yet respondent would seek to deny petitioners allotments because of lack of tribal organization. When we show that the families of many petitioners have been and are on the census rolls as belonging to the Quinaielt or other fish-eating tribes (Upper Chehalis, Shoalwater Bay, etc.) respondent discredits its own census rolls (R. 411, 433, 538, 594) and then seeks to deny others because their names do not appear on the census rolls (R. 411, 591-592). When we show that the allotment roll is the only accurate roll and show that the fathers or mothers or both fathers and mothers of petitioners, and relatives are allotted, respondent repudiates its own allotment instuctions (R.

525) and says that, because the parents are allotted, it is no reason why the children should be. (R. 452). But Exhibit 15 shows beyond doubt that the allotment instructions of 1904 are still in effect. This exhibit is also copied into the record (R. 616) but with one reporter's mistake. The word "enrollment" should read "adoption". See Exhibit 15. The rights of the children are clearly shown by the opinion of the Attorney General in reference to the children of Frank Mounts (1929) Appendix "J".)

The Court will observe the reasonable and fair way this question of tribal organization was treated by the trial court:

> "The evidence in the present case indicates that the Indians at Chinook, Dahlia, Shoalwater Bay and Oakville have no tribal organization. They are, as the witness Bush says of the Indians at Shoalwater Bay, 'remnants of bands and tribes.' The Superintendent of Indian Affairs for Washington Territory, in recommending the enlarged reservation, said (1872):
>
> > 'all of the tribes made parties to this treaty, together with the remnants of the Chehalis, Humptulips, Shoalwater Bay and Chinook tribes,. . . . .'
>
> "They still cling together at and about the old haunts of the former tribal organization and are

therefore 'tribes' within the meaning of the Executive Order and Act of March 4, 1911. In the Montoya case, supra, the tribal characteristic of one leadership of government and the band characteristic of one leadership in a common design or concerted action is pointed out by the court. This characteristic in so far as the groups of Indians above-named in the present case, is, save as pointed out, wanting, as there is no tribal organization. But it should be borne in mind in considering the language of the court above quoted from the Montoya case, that the court was considering the question of tribal action or the action of a band as distinguished from the individual action of members of a tribe or band. To such action leadership would be essential. The court was not considering the question of surviving membership in a vanishing tribe" (R. 331, 332).

But respondent, while not openly contending, at least appears to suggest that these cases have no equity because of the presence of white blood or because some of the petitioners do not live in the same manner as did their ancestors. We cite then the following acts of Congress:

Act of June 14, 1862 (12 Stat. L. 427, R. S. 2119).

Act of March 3, 1875, (18 Stat. L. 420).

Allotment Act of February 8, 1887, (24 Stat. L. 388). (Appendix "D").

Act of August 9, 1888, (25 Stat. L. 392).

Act of June 7, 1897, (30 Stat. L. 90) (Appendix "E").

Act of May 8, 1906, (34 Stat. L. 182).

And finally the Citizenship Act of June 2, 1924, (See Appendix "G").

All of these acts of Congress, and many others of like tenor, show a studied policy, a direct intent on the part of Congress that these people should not be penalized for giving up the customs and habits of their forefathers and living as civilized men. All these acts are particularly applicable to the situation of the petitioners who could not go upon the reservation owing to conditions described herein.

Even the presence of white blood should not affect the equity of these cases. These suits are brought under a statute which reads:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment . . . . . "

(25 U. S. C. A. 345) (28 Stat. L. 305 Sec. 1).

It is admitted by the United States that the quantum of Indian blood is not the test of a right to allotment (R. 451). Many Indians have much less of Indian blood than petitioners have been allotted (R. 451).

The action of the Circuit Court of Appeals in the present cases strongly suggests that it believed that only children of full blood Indians should be allotted. Anyone acquainted with Indian law knows that the United States Government has never taken that attitude. Mixed bloods have always been provided for.

The recent Act of June 4, 1924, (C. 253, 43 Stat. L. 376, U. S. C. A. Title 25, pages 186-188), relating to the lands of the eastern band of Cherokee Indians and in part to the allotment of said lands shows this. Section 13, page 188, provides:

> "That any member of said band whose degree of Indian blood is less than one-sixteenth may, in the discretion of the Secretary of the Interior, be paid a cash equivalent in lieu of an allotment of land."

The very lowest degree of Indian blood of any of the petitioners is one-eighth.

See also *Sioux Mixed Blood Cases;* Opinions of Attorney General, Vol. 20, pp. 742, 743.

Pennock v. Commissioners, 103 U. S. 44.

Besaw v. Work, 6 Fed. 2nd) 694.

Sloan v. United States, 118 Fed. 283.

While, in spite of the above, we know that, in any case of equitable cognizance involving the relative rights of full bloods and mixed bloods, reasonable minds would and should give the full bloods the greater consideration, this is not a question of relative rights. If the Quinaielt Reservation were a small and limited reservation whereon there was not sufficient room for all, equity would dictate that those whose Indian blood was greatest should be given preference. In such a case respondent's argument might have merit. But the Quinaielt Reservation is a large reservation (R. 442). Almost all of it is allotable land (R. 442). At the date of the trial but a little more than half of it was allotted (R. 443). In that record citation Agent Roblin is wrong on the size of the reservation being some 25,000 acres short, an immaterial amount on such a large reservation. There will be much land left over after all the Indians have been allotted, or at least the work of allotting will continue a great many more years (R. 443). Under the Circuit Court of Appeals ruling on residence, it would continue indefinitely down to the tenth or twelfth generation. Surely no other

group of Indians within the United States have been favored as would be the Quinaielts under that ruling. We know of no Indians more entitled to allotments than these descendants of the fish-eating tribes of Southwestern Washington whose vast territory was taken from them by the white race without any payment or compensation. In any event the rights of the Reservation Indians are fully protected, first, by the treaty which was prior to the Executive Order of November 4, 1873, and, second, by the Act of March 4, 1911, which specifies that allotments as therein provided for should be made from surplus lands after allotments to the Indians on the Reservation have been completed (Appendix "F").

Another way of interpreting this question of the presence of white blood in these Indian petitioners: If the Indians had been placed upon the Quinaielt Reservation at the time of the treaty, 1855-1856, or one year after as therein provided, or at the time of the Executive Order of November 4, 1873, the situation would have been quite different. But in order to make a living they have been forced to stay off the reservation, in their ancient haunts or habitat. The whites in all cases have moved in and around them. There has, of course, been somewhat more interbreeding of the whites and Indians than there would have been had the

Indians been placed upon the reservation. This could scarcely be called the Indians' fault. It is not necessary to go outside of the record. The court will appreciate what kind of marriages are these between white men and these Indian women who lived along the shores and beaches of the Columbia River, Shoalwater Bay and Grays Harbor. The word marriage is often not in every sense applicable. The fact that Lizzie Rolfson, Case 153, has had three white husbands (R. 472), and Kate Walkowsky, Case 152, two husbands (R. 522) is possibly suggestive. The Court knows that the situation of mixed blood Indians in the world is not always pleasant. As Cleve Jackson, hereditary Chief of the Quinaielts, himself says:

> "That outside (the Reservation) any one of any degree of Indian blood is considered by the white man as an Indian, and on the reservation he is considered a white man." (R. 562).

Those of petitioners in whom the degree of Indian blood is less than in some of the others are able to show most clearly recognition and tribal relationship. If it had not been decided and admitted in these cases that degree of blood was not the test (R. 451), we would never have permitted these cases to be combined, for fear of prejudicing the rights of those in whom Indian blood was greater.

We would not here discuss this matter had not the Circuit Court of Appeals apparently considered it a factor in the face of its conceded immateriality (R. 643). We believe that the trial court, having an opportunity to view these people, is in a better position to judge the Indian appearance, mode of life, and the general equities of the situation in this particular.

Is Residence on the Quinaielt Reservation a Prerequisite for Allotment?

The most important question in these cases is whether or not the Chinook, Chehalis (Upper and Lower) and the Cowlitz are entitled to allotment on the Quinaielt Indian Reservation. The lower court, following the opinion of the Solicitor for the Interior Department, held that these Indians should be allotted. The Circuit Court of Appeals, holding that the Act of February 8, 1887, made residence in all cases a requisite to allotment and that the Act of March 4, 1911, did not help matters, decided that they could not be allotted. This latter view is contrary to the views of all of the government's own witnesses, to the long established policy of the Indian Department in this locality, as well as contrary to the opinion of the Solicitor above referred to, which opinion is admitted to be the allotment instructions for the Quinaielt Indian Reservation (R. 295-826).

The ruling of the Circuit Court of Appeals on the question of residence is also contrary to the testimony of Alotting Agent Roblin, who states on page 443 of the record, lines 24 to 30:

> "The Act of 1887 *provided that residence was not necessary;* that he is familiar with the allotment rolls of the Quinaielt Reservation; that there have been some Satsop Indians allotted on the Quinaielt in years gone by, and Humptulips, Bay Center Indians, Lower Chehalis,"

and on page 444 of the record he further testifies:

> "That the Superintendent certified to him the last schedule prepared and forwarded by him to Washington, that that schedule did carry names of members of those various tribes."

H. H. Johnson, who was Superintendent of the Quinaielt Reservation from 1908 until October, 1913 (R. 498) while the first allotments were being made, testifies that residence on the reservation was not a requisite to allotment (R. 497-500-501). This was under the Executive Order of November 4, 1873, (Appendix C), and the Act of February 8, 1887, and before the passage of the Act of March 4, 1911. He testifies that because of the local situation he was particularly instructed to be very liberal in the matter of allotments. (R. 499).

In the face of the opinion of the Solicitor for the Interior Department (R. 295-326) and the documents set out therein, it is not now very strenuously urged by the respondent that the Executive Order of November 4, 1873, was not promulgated to provide for the Indians of Southwestern Washington. They most clearly are the "other fish-eating Indians on the Pacific Coast" referred to in that Executive Order.

Respondent in effect contends, however, that the General Allotment Act of February 8, 1887, (Appendix D), and the Special Quinaielt Allotment Act of March 4, 1911, (Appendix F), have superseded the Executive Order so far as allotment is concerned. This, according to their interpretation of those acts, means that, of the tribes of Indians, or remnants thereof, for whom the reservation was enlarged and set aside, only a few of those tribes are entitled to allotment. The obvious inequity of such a contention urges us to seek for the reasons for its being held. The only reason we can suggest is that the better organized Indians who live upon and close to the reservation have influenced the agents of the government at Hoquiam. The 150 to 200 reservation Indians know that there is more than enough land to allot all the Indians for whom the reservation was set aside (R. 442, 443). Because the other tribes or bands have not been placed upon the reservation, this little group has grown to

believe the reservation belonged to them. They know that timber and land which is left over will belong to all of them as tribal property. It is but natural for them to wish that as few as possible allotments be made on the Reservation. As evidence of this, we have the testimony of Samson Johns, witness for defendant, that he believes only Quinaielt Indians should be permitted on the Quinaielt Reservation (R. 534). Strangely enough this very witness states that he himself is "part Lower Chehalis Indian and part Chinook Indian" and that he, though allotted without adoption, lives at Copalis, not on the reservation (R. 534-535). The record is replete with such testimony.

There is also the testimony of Superintendent Sams concerning the last roll submitted to the council for recognition:

> "That though the Department did approve of a large number of names on this roll that the Indians did not approve of themselves, the reason given for that was that after the Indians had objected to these names, he called a council meeting and endeavored to get the Indians to consider the names objected to at the council meeting, but the Indians declined to do so, saying, 'We don't want these people; we won't vote on them,' and adjourned the meeting; that then he submitted the whole matter to the Indian

Office in Washington, and asked for instructions, and that Department sent back a list of names, 50, 60 or 70 on the list, and told him to certify them because those particular names had been on the roll 10 or 15 years without objections and they had no real grounds to allege they had been put on with fraud, so that on instructions of the Secretary of the Interior he was obliged to certify that list.

"[illegible] there were about 200 names on the last roll that the Indians had not passed upon favorably; that he (the witness) does not know how those names got on the roll, but does know that the Indians object to them being allotted." (R. 468).

When we say the Indian Agents and Allotting Agents may have been influenced by the organized Quinaielt Indians to the prejudice of the others of Southwestern Washington, we do not believe that there has been any deliberate intention toward favoritism on the part of the employes of the government. They have had a difficult task and we merely suggest that they may have been unconsciously influenced by their close contact with the Quinaielt Tribe and by their desire to please the Indians of that tribe.

Referring back to the two allotment acts we said that respondent now contends that these acts

make it impossible to allot the Indians of all the bands for which the reservation was set aside even though 1,000 Indians of these bands have already been allotted.

Let us see if this is true. It is entirely clear from the record that the Indians have never been placed upon the Quinaielt Reservation; that, because of the uninhabitable condition of the reservation, they would have starved to death had they gone there voluntarily (R. 499). It is also clear that many of them have continued to remain in little settlements throughout the region but off the reservation (R. 499). Dahlia on the Columbia River, Bay Center on Shoalwater Bay, and Oakville on the Chehalis River are examples of these settlements, long the habitat of the Indian bands. Some, too, had gone into the white settlements of the neighborhood and worked in mill camps and lumber camps. Mr. H. H. Johnson, former Indian Superintendent for Southwestern Washington, stated that he could never see how this scattering into white settlements to make a living mitigated against their rights on the reservation (R. 500). As we pointed out, both Mr. Johnson and Mr. Roblin, the present allotting agent, say that residence on a reservation is not necessary for allotment on the Quinaielt Reservation under the General Allotment Act of February 8, 1887, (R. 443). It should be noted, however, that, with possibly three exceptions,

the petitioners have not scattered even locally. They all live in the original habitat of their ancestors.

The Circuit Court of Appeals holds that, because that act reads "and cause allotments to be made to any Indian located thereon," residence upon the reservation is a requisite to allotment and, as a result thereof, the Chinook, Upper and Lower Chehalis and Cowlitz Indians who do not live on the Quinaielt Reservation are not entitled to allotment under the General Allotment Act. As authority for such an unjust holding, the Court quotes from the case of *Lemieux v. United States*, 15 Fed. (2nd) 518, wherein it is said:

> "No case has been cited, and we have been unable to find any, which holds that a tribal Indian, living apart from the tribe and off the reservation, is entitled to an allotment under section 1 of the act of 1887, and the language of that act seems to preclude such a holding."

Following this quotation the Circuit Court of Appeals in the instant cases continued:

> "This fact would justify and require the Secretary of the Interior to deny their applications for allotment under the general allotment law and would require a denial of their application by the District Court."

On this question of residence alone the Circuit

Court of Appeals reversed five-sixths of these cases.

This reference to the General Allotment Act in the Lemieux case was clearly dicta, the case being decided on the ground of laches.

The Lemieux case, upon which respondent and the Circuit Court of Appeals rely in holding that residence upon a reservation is necessary to allotment, is worthy of further notice. Peter Lemieux was a Chippewa Indian of the Fon-du-lac band in Minnesota. He made a claim for allotment under the provisions of the Act of 1887 for land upon the LePoint Indian Reservation in Minnesota and received a certificate from the allotting agents showing that he had made a selection. Some of the timber on the selection was sold shortly thereafter and Peter Lemieux received a part of the money. No trust patent was ever issued to him by the government. Shortly after he received this money he and his family left the reservation and began living in Superior, Wisconsin. Seven years later, in 1895, the Department allotted this particular land to another Indian, Shah-bah-yaust, and a trust patent issued to her. Lemieux on November 7, 1923, more than thirty-five years after he had made his selection and twenty-seven years after the land had been patented to another Indian, brought an action to have it determined that he was the owner of this land. This action was in equity in the nature of

an action to quiet title. The court denied him the relief sought, principally and primarily and finally, on the ground of laches. The court goes into a somewhat extended recital of this fact and concludes the opinion with this significant statement:

> "There is nothing about his claim after a a lapse of a period of thirty-five years which appeals to a court of equity."

Furthermore, the Court was therein dealing with a tribe which had actually been placed upon a reservation.

Judge Sanborn in this case of *Lemieux v. United States*, cites the case of *Bonifer v. Smith*, 166 Fed. 846, and the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and distinguishes between those cases and the case he is deciding. Both of these cases deal with the Umatilla Allotment Act of 1885, which dealt with the "confederated bands of Cayuse, Walla Walla, and Umatilla Indians *residing* on the Umatilla Reservation," in both of which cases it was held that, because of the local situation and the long established policy of the government encouraging Indians to break up tribal life and live as white men, residence was not a requisite to allotment under that act. Surely the dicta in the Lemieux case should not be deter-

minative of the rights of petitioners whose situation is so peculiar and different.

It should be noted that petitioners are by no means relying upon the Act of February 8, 1887. The Executive Order of November 4, 1873, was promulgated to provide a reservation for the Quinaielt, Quillehute, Hoh, Quit and other tribes of fish-eating Indians on the Pacific Coast.

This order was promulgated two and a half years after the passage of the Act of March 3, 1871, which prohibited further treaties with Indian tribes. In view of the situation and the historical events which preceded its promulgation (See Statement of Case), it is not an unreasonable contention that this Executive Order was promulgated in lieu of a treaty with the Indians who had met in the negotiations at Cosmopolis but who, as events transpired, did not sign the Treaty of July 1, 1855, and January 25, 1856. It is only by means of such an assumption that the enlargement of the Quinaielt Reservation to 22 times its original size can be explained (R. 499).

In the separate discussion of the Act of February 8, 1887, on page 99, we will show that generally and more especially locally that act has been construed to not require residence upon an Indian Reservation.

It appears to us that the Circuit Court of Ap-

peals did not take into consideration the local situation or the physical condition of the Quinaielt Reservation. It seems that the case of *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, should have been determinative of the question of residence. As we said, the Court was therein interpreting the Umatilla Allotment Act which read:

> "To cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians *residing* on the Umatilla Indian Reservation."

In answering the same argument that is presented in these cases, the Court said:

> "The purpose of the act would fall very far short of accomplishment were allotments to be confined exclusively to those actually residing within the limits of the reservation, while those absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled to the allotments under the act, simply because of residence outside of the described limits of the reservation."

How clearly that reasoning would apply to these cases! The petitioners could not go upon the Quinaielt Reservation until it is cleared. They con-

tinued to live in the ancient habitat of their own tribes or bands, and respondent's agents have always told them that their rights on the reservation would not be prejudiced by their so doing (R. 494, 443). Petitioners are all recognized by the Indians of their own settlements and many of them have been recognized by the Quinaielt tribe. The case of *Bonifer v. Smith*, 166 Fed. 846, a corollary to the Hy-yu-tse-mil-kin case, is even more in point.

In this connection, one of the chief reliances of respondent in these cases is the case of *Oakes et al v. United States*, 172 Fed. 305, in which Judge Van Devanter, construing the Act of January 14, 1889, held that the children of an Indian woman who married a white man and left the reservation were entitled to allotments but that the grandchildren were not. It is well to consider the situation in that case as compared with the situation in these cases. The Chippewa Indians ceded a large and valuable country to the United States. They were actually placed upon the White Earth Reservation in Minnesota, a habitable reservation. The lands ceded were sold and the money received therefor paid as annuities to the Indians. (Kappler 2nd Ed. Vol. I). Food, clothing, agricultural implements, cooking utensils were furnished the Indians. Treaties were made with all the bands of the Chippewas, in some cases several, all very favorable to the Indians (Kappler's Laws and Treaties, 2nd Ed.

Vol. II). The Chippewas had waged savage warfare against the United States.

The Quinaielts and Indians of Southwestern Washington had never waged war against the government. The remnant bands of Southwest Washington were not provided for by treaties, the Yakima and Rogue River Wars and the Civil War, followed by the Act of March 3, 1871 (16 Stat. L. 566) (R. S. 2079), prevented further treaties being made. None of them have been given annuities so far as we have been able to determine. The reservation provided was not habitable. They were never placed upon it. They have been by necessity self-supporting Indians.

The Oakes family moved to a great city, St. Paul, and clearly cast their lot with the whites. Petitioners have not cast their lot with the white people, but they still live in their original habitat of their ancestors. This is one vital difference between these cases and the Oakes case. A large number are still fishermen, and make their living in the same manner as did their ancestors.

But respondent would answer to the above: "What you say may be true, the Indians may not have cast their lot completely with the whites, but they have abandoned their tribal organizations. The Acts and Executives Order refer to tribes or members of tribes. Citing *Montoya v. United States*,

180 U. S. 261. This we have already answered but we add that locally tribal organization was a very hazy thing even before the days of the Quinaielt Treaty or the Cosmopolis negotiations. (R. 409, 410, 495, 496, 547, 548). These people are still placed on the government census rolls generally as Quinaielts. (R. 448-493, 593). A similar situation was faced by the Court in dealing with the Klamath Indians who lived on what was claimed to be a totally abandoned Indian Reservation, in the case of *Crichton v. Shelton*, 33 L. D. 205-219. In that case it was said:

> "Being self-supporting and independent as they were, it may be their tribal relations were not so intimate and pronounced as other tribes who were dependent upon the government. But they were nevertheless looked after by agents of the government and were always regarded and treated as a tribe."

The Quinaielt tribe has a business organization to handle a few local matters (R. 432), but aside from that they have no true tribal organization. While most of the Quinaielt Indians do not live upon the reservation, the only tribal meetings are those called by the Superintendent. The Superintendent notifies such Indians as he chooses and calls it a tribal council (R. 467, 607). In the meeting called by Agent Roblin in the year 1918, he called

only 65 out of 750 allotted Indians (R. 437, 480-481, 603). This was a part of the little group of reservation Indians who are able to make a living on the reservation by fishing. These were the very Indians who would be most likely to wish that no more allotments be made. Though the Indians were asked by the Agent Roblin to refuse adoption to many they had in 1912 voted to recognize or adopt (R. 480-481, 607, 608), Agent Roblin did not notify those Indians who were to be voted upon. (R. 607, 608). In fact he states he took pains not to notify them. All of these cases are even stronger than the case of *Besaw v. Work*, 6 Fed. (2nd), 694, wherein the action of a tribal council such as this, even though approved by the Secretary of the Interior, was held to be but a declaration of self interest.

It appears that the lower court viewed the 1918 meeting in a similar way (See page 337 of Record).

If the Agent should call together the Lower Chehalis, or the Upper Chehalis, or the Cowlitz, or the Shoalwater Bay Indians, there would be practically as much reason to speak of these as tribes instead of as remnant bands. But the Agent or Superintendent has not seen fit to call these other groups together, although allotted on this reservation. Annuity payments have doubtless held

many tribes together throughout the country (R. 433). It does not seem that these Indians should be prejudiced because they have not been given annuities, and because therefore the Agent's rolls of them have not always been accurate or correct (R. 411, 433, 538, 594).

THE QUINAIELT TREATY OF JULY 1, 1855, AND JANUARY 25, 1856.

It appears that this treaty was first signed by the Quinaielt Indians on the Quinaielt River on July 1, 1855. Later, and for some reason unknown, the Quileute Indians were brought in for the first time, and the treaty was completed with them at Olympia, Washington, on January 25, 1856, over six months later (12 Stat. L. 971).

As a basis for the argument that follows, we first call attention to Article 6 of the treaty (Appendix "A"), giving the President the right to consolidate the two tribes above named with other friendly tribes or bands. This is the authority by by which the President later promulgated the Executive Order of November 4, 1873, which is discussed at length in this brief.

In order to more fully establish our contention that residence on the Quinaielt Reservation is not a requisite for allotment, we call attention to the fact that this same Article 6 of the Quinaielt Treaty

provides that it should conform to the 6th article of the Treaty with the Omahas, *so far as the same may be applicable.* The itilicized statement should be borne in mind, as the respondent contends that petitioners are bound by Article 6 of the Omaha Treaty, that said Article 6 was the foundation of the Allotment Act of 1887. Respondent alleges that both the 6th article of the Omaha Treaty and the Act of 1887 are inherently settlement acts and that an Indian must first reside upon a reservation before he can apply for an allotment.

The record shows that all petitioners complied with the 6th article of the Treaty with the Omahas embodied in the 6th article of the Quinaielt Treaty, *so far as the same may be applicable.* They could not go upon the reservation as could the Omaha Indians.

In speaking of the Quinaielt Treaty it should be remembered that many of the petitioners claim allotments as Quinaielt Indians and children of recognized and allotted Quinaielt Indians. Into this class come petitioners embodied in cases Nos. 146, 149, 150 and 151. In cases Nos. 147 and 148, the Quinaielt blood and the Lower Chehalis blood is so mixed and intermingled that it is not possible to distinguish between the two (R. 547-548). To some extent this is true in all the cases save in that of No. 154, known as the Provoe case, in which

the petitioners base their right upon a showing not of Quinaielt blood but of Chehalis blood, and upon recognition by the Quinaielt tribe as being Indians entitled to allotment.

Governor Stevens himself, in drafting the treaty, recognized that the Quinaielt Indians lived a nomadic life and would probably continue to so live; that they would continue to fish at their old grounds and stations within and outside of the reservation. This has a very definite bearing on the necessity of residence on the reservation as a requisite for allotment. On this point we cite Article 3 of the Quinaielt and Quileute Treaty (Appendix "A"):

> "Article 3. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands."

In the memorandum opinion in Case No. 272E, *Agnes Elliott et al v. United States*, dated May 21, 1926 (unreported), United States District Court for the Western District of Washington, Southern Division, the case which established the status of

the Elliott family as Quinaielt Indians, the Court said:

"While the purpose for negotiating the treaty was, in part, to gather the tribes and bands upon the reservation, there is no express provision in the law or treaty for forfeiture of the tribal rights and interests of a member of the tribe who lives separate and apart from the reservation, or separate and apart from the tribe. The language of Sec. 6, of the general allotment Act of 1887, as amended, 24 Stat. at Large, 390; 34 Stat. at Large, 182; Comp. Stat. Sec. 3957, is:

" 'That every Indian born within the territorial limits of the United States who has voluntarily taken up within such limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is declared to be a citizen of the United States . . . . whether said Indian has been by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property.'

"Congress might reasonably conclude that assurance of a retention of interest in tribal property by those who had forever severed the tribal

relation was necessary. Such a provision by no means implies that those who have for even an extended period wandered from the body of the tribe, but still lived the tribal life, are to be cut off. Theirs is still the need for help and encouragement, while with the first class, presumably, the need for aid is passed.'

"'There is no showing that these lands, or the timber on them, have been cared for by those of the tribe on the reservation, which ... would give rise to an estoppel favoring them over those who had strayed from the reservation. In purely tribal life, no doubt the rule would be that those of the tribe who defended the tribal property, in the absence of agreement otherwise, own the property as against those who wandered from it and afforded it no protection. Sec. 6 of the Act of 1887 is inconsistent with any idea upon the part of Congress that because of their turbulence, Indians must any longer be kept upon reservations, for the protection of the whites.'

"In *United States v. Winans*, 198 U. S. 371, the Supreme Court upheld the right of the Yakima Indians to occupy lands off the reservation, on the banks of the Columbia River, for use in connection with their right to take fish from that stream, and dry them. This right was

based upon Art. III of the treaty with the Yakimas which, in so far as material is in substance the same as the treaty with the Quinaielts; which latter reads, in part:

> " 'The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing the same, together with the privilege of hunting, gathering roots and berries and pasturing their horses on all open and unclaimed lands; provided, however, they shall not take shell fish from any beds staked or cultivated by citizens.'

"While the lands ceded by the Quinaielts in the treaty do not include Shoalwater Bay nor extend to the Columbia River, yet the evidence shows that in their fishing and hunting, since and before the treaty, the Quinaielts have been accustomed to go as far up the Columbia River as Chinook and Dahlia. It is not necessary here to adjudicate what if any right, to the exclusion or in common with others, the Quinaielt Indians have or had in such fisheries. It is enough that in resorting to and remaining at the fisheries of Chinook and Dahlia, which fisheries they might in perfect good faith—under the evidence—claim were part of the usual and

accustomed grounds and stations of the tribe, they have shown no intention to abandon any other tribal right or property or sever their tribal relation.

"The conclusion reached is supported by the following decisions: *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401; *Bonifer et al v. Smith*, 166 Fed. 846; *Smith v. Bonifer*, 154 Fed. 889; *Oakes et al v. United States*, 172 Fed. 305; *Sully v. United States*, 195 Fed. 113; *Vezina v. United States*, 245 Fed. 411; *United States ex rel. Besaw v. Work*, 6 Fed. (2) 694; *Bisek v. Bellanger et al*, 5 Fed. (2) 994."

The decision from which the above is quoted established the rights of the parents of petitioners in cases 146, 149, 150 and 151 to allotments as Quinaielt Indians living at or near Dahlia, Washington. The case was never appealed from by the United States. In the present cases respondent seeks to show by the testimony of one or two picked reservation Indians that the members of the Elliott family were not Quinaielt Indians and that no Quinaielt Indians lived down on the Columbia River. The testimony is replete with statements to the contrary (R. 383, 384, 388, 394, 414, 417, 421, 422, 425, 426, 487, 488, 489, 492 to 521, 532, 564, 577). As these cases were tried by District Judge Cushman who tried the above noted case, it was not

thought or considered necessary to introduce detailed testimony which established the status of the parents of the Elliott petitioners to allotments. Pleadings in this case were admitted in evidence (R. 484, 485) (Exhibit No. 10) and many references are made to this case in the Record (R. 485, 512, 606). This part of the argument is applicable, not only to the Elliott family, but also to almost all of the petitioners.

THE EXECUTIVE ORDER OF NOVEMBER 4, 1873

This Order provided:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians"—"and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory"—"be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast."

(Kappler, Ind. Affairs, Laws and Treaties, Vol. 1 (2nd Ed.) pp. 923-924. Appendix "C").

Let us at the very outset inquire: Why was the Executive Order of 1873 promulgated? The Quinaielt, Quileute, Hoh, and Queets Indians were all entitled under the Treaty of 1855-1856. The Circuit Court of Appeals so holds, as that opinion

states that the Hoh was but a band of the Quinaielt, and the Queets but a part of the Quileute tribe (R. 638), and the Ozettes numbered but 44.

If the Circuit Court of Appeals is correct in its construction of the Allotment Act of March 4, 1911, then the reservation was enlarged from 10,000 acres to 224,000 acres simply to take care of 44 Indians.

We do not believe that this is a proper construction of this order, as applied to subsequent legislation. If the Quinaielt, Quileute, Hoh and Queets Indians were entitled under the Treaty, which they were, why then was there any necessity for the Executive Order of November 4, 1873? The Circuit Court of Appeals does not answer that question.

The only conclusion to be drawn from the opinion is that the Executive Order was promulgated and the reservation enlarged solely to provide for 44 Ozette Indians.

> "All statutes must receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd consequence."
>
> *Hawaii v. Mankichi*, 190 U. S. 197.

We are completely at loss to comprehend the Circuit Court of Appeals' attitude relative to this

Executive Order. In the Halbert opinion the Court sets it out (R. 639), but fails to construe or pass upon its meaning.

The Solicitor for the Interior Department in his opinion of September 2, 1916, (Exhibit No. 9), when the status of all these petitioners who live on cific Coast, members of the Quinaielt, Quillehute, Shoalwater Bay, Grays Harbor, at Dahlia near the mouth of the Columbia and at Oakville, was no different than it is today, concluded:

> "While the Quinaielt Reservation is one of the largest west of the Cascade Range, it was evidently not intended that all the unattached Indians as far east as that range could secure rights on that reservation. The more reasonable view is that *only the Indians of the tribes or bands on the immediate coast of Washington and those affiliated therewith were contemplated.*"

He thus excludes the Indians of the Puget Sound region.

He quotes the Superintendent of Indian Affairs for Washington Territory recommending the enlargement of the Quinaielt Reservation in 1872, the very recommendation which caused the Execu-

tive Order of November 4, 1873, (Appendix "C") to be promulgated:

> "All the tribes made parties to this treaty, together with the remnants of the Chehalis, Humptulups, Shoalwater Bay, and Chinook tribes, residing along this coast south of the reservation to the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish-eaters and draw their subsistence almost wholly from the water, and therefore have but little taste or desire for agricultural or land productions."

This defines the fish-eating Indians on the Pacific Coast. (See also definition of Superintendent Johnson [R. 502]).

The Solicitor (R. 298) quotes further from that same recommendation:

> "The reservation thus enlarged would afford two more fisheries on the Pacific Coast, and perhaps several others around Lake Quainaielt, and would afford occasional patches of agricultural and grazing lands, *and upon it should be collected not only the three tribes named*, but also all the other tribes and bands of fish-eating Indians on the Pacific Coast, from the south side of Neah Bay reservation to the mouth of *the Columbia River*; all of whom could find

room and homes on this enlarged reservation." (Italics ours).

In these cases respondent and the Circuit Court of Appeals would limit allotments to the Indians who live north of Grays Harbor. They would do this now, in face of the action of the Department in the past in following the Solicitor's opinion and in allotting members of these bands south of Grays Harbor without the necessity of adoption into the Quinaielt tribe. It might be said that the petitioners who live on the little Oakville Reservation do not live on the immediate Coast, but live 30 miles inland from Grays Harbor (See map p. 9). But we have shown that the Upper Chehalis, though they used different fishing methods, were nevertheless affiliated with the Lower Chehalis tribe (R. 581), the names Upper Chehalis and Lower Chehalis having been applied by the whites for convenience (R. 427). They fished down to the mouth of the Chehalis River (R. 581). The Solicitor held that members of most of the 40 tribes then applying were not entitled to allotment because they already had allotable reservations set aside for them and because they were not fish-eating Indians on the Pacific Coast within the meaning of the Executive Order of 1873.

But the opinion (R. 295-326), as well as the correspondence set out therein, shows very conclu-

sively that the rights on the Quinaielt Reservation of the fish-eating tribes on the Pacific Coast have never been questioned. They have never been questioned until these petitioners sought allotments. As we have said, the only reason we can suggest is that the reservation group of Indians have exerted their influence upon the local agents. Of course the Department may still have the view it pressed from 1912 to 1924, that timber land is not allotable, and that the less allotted the better, but since that quesion was decided in he case of *Tommy Payne v. United States*, 264 U. S. 446, this would hardly seem possible.

The Circuit Court of Appeals quotes some of Allotting Agent Roblin's testimony relative to the Act of March 4, 1911, but overlooks his testimony wherein he discusses the Executive Order of November 4, 1873. (Appendix "C"). He testified:

> "That possibly half a dozen of the Indians at Quinaielt are living on their allotments; that the Act of 1911 was passed to provide for the same things as was the Executive Order of 1873; they were passed and supposed to *ne* in conformity one with the other, for the purpose of clearing up a controversy as to whether or not the subsequent creating of small reservations for Osette, Quileutes and Hoh tribes, would bar them from exercising their treaty rights un-

der the Treaty of 1855-1856—not for the purpose of one repealing the other; that the Opinion of the Solicitor made in 1916, wherein as he says 'that the fish-eating Indians of the Pacific Coast are not intended to include all the tribes or bands, but those Indians of the Pacific to the mouth of the Columbia River' is absolutely in conformity with the recommendation of W. W. Miller, superintendent of Indian affairs in charge of Western Washington in 1865; recommending the creation of a reservation, exactly in conformity with the letter of the Commissioner of Indian Affairs to the President, and in conformity with the Executive Order." (R. 446-7). or that part on page 448 of the record:

"That he does not think it would be necessary for members of the Lower and Upper Chehalis or Chinooks entitled to allotment on the Quinaielt reservation under the Executive Order of 1873 and the Allotment Acts, and regardless of whether or not they are members of a particular band to seek the recognition of the Quinaielt tribe before being allotted; that his previous testimony was not based on the assumption that only members of the Quinaielt tribe have the say about allotment of land on the Quinaielt reservation; that it is not his belief that Indians whose names appear on the Quinaielt census roll for allotment, but who live at Bay Center,

or elsewhere, would be required to appear before the Quinaielt tribal council for recognition before being allotted; and the same condition prevailing except that the applicant's name did not appear on the census roll of the Quinaielt Agency, it would be necessary for him to show recognition once existing by the tribe to which he claimed membership; that is, it would be necessary for him to show he was a member and recognized as such, of some one or several of the tribes entitled to allotments on the Quinaielt reservation."

Much of the cross examination in which the above quotations appear is worthy of the Court's attention. Agent Roblin corrects a number of misconceptions created by his direct testimony.

In the opinion in the Provoe case (R. 668) the Circuit Court of Appeals again refuses to construe the Executive Order of November 4, 1873.

"nor do we wish to be understood as determining whether or not Upper Chehalis Indians are provided for by the proclamation." (R. 688).

But only a few lines back the Court said:

"As we have indicated, her right to an allotment under the general allotment law, as modified by 25 U. S. C. A. Section 184, concerning the right of a child of an Indian mother and a

white father, which we think excuses residence in the reservation as a prerequisite to allotment in such cases, depends upon the question as to whether her mother was a recognized member of one of the tribes for which the Quinaielt Indian Reservation was set aside, and this depends in part upon the terms of the proclamation of November, 1873."

Mary Francis Provoe, the daughter of a full-blood Chehalis Indian, probably Upper Chehalis, is thus not entitled to allotment on the Quinaielt Reservation, unless her mother is found to be a Lower Chehalis, even though the court in effect says the Quinaielt Reservation may have been set aside to provide for the Upper Chehalis too. The Court thus first finds that her rights depend in part upon the Executive Order of November 4, 1873, and then refuses to construe that proclamation. Surely the Circuit Court of Appeals did not grasp the inconsistency of its own words.

We contend that the Executive Order is the backbone of a large number of these cases. These remnant bands of Southwestern Washington had refused to sign the Treaty of 1855 and 1856, though they were present at the negotiations, and we have shown that their refusal was not unreasonable. From 1856 to 1873 the whites moved in and took all their land on the coast of Washington, from

the Olympic Mountains to the Columbia River, and they were not compensated for it in any way. The Indian Wars and the Civil War followed by the reconstruction problems prevented any further negotiations with these then far distant Indians. The Act of March 3, 1871, (Appendix "B"), prohibited the making of any more treaties with Indian tribes. So the government was faced with the question of what to do about these Indians of Southwestern Washington. It had never been the policy of our fair dealing government to take valuable lands from the Indian tribes without some form of compensation. But, as we said, it was not possible to make a treaty with them. In these years since the treaty the coming of the whites had brought stable government. It was now (in 1872 and 1873) possible to fulfill Governor Stevens' plan to put all these Indians on one reservation in the Quinaielt country. And so it appears the Executive Order of November 4, 1873, (Appendix "C"), was promulgated, in lieu of a treaty. It enlarged the reservation to 224,000 acres, 22 times its original size, and provided for the tribes who signed the treaty and for the "other fish-eating Indians on the Pacific Coast." As we said, the Circuit Court of Appeals would have us believe that it was then enlarged to provide for 44 Ozette Indians! It may be asked why the tribes of fish-eating Indians were not specifically named. The answer is found in the

very report of the Superintendent of Indian Affairs for Washington Territory recommending this enlarged reservation (R. 297-299). They, the Chehalis, Humptulups, Shoalwater Bay and Chinook Indians, were mere remnant bands in 1872. (See R. 297, bottom of page). But the reservation as enlarged was not habitable and it does not appear that the government wished to expend the money to make it habitable. The Indians would have starved to death had they removed to the reservation voluntarily. So the Indians have been left where they were to make such a living as they could, waiting for the day when their reservation should be cleared of its timber so that they could go upon it and make their homes. They have had a long wait. In 1887 the General Allotment Act was passed and they expected to receive their allotments. But their reservation was not surveyed. It was not surveyed until 1903. (See Report of Harry F. Liston, Superintendent of the Quinaielt Agency. Annual Repts. of Dept. of the Interior, Indian Affairs, Part I). We have discussed the subsequent delays.

The aids to the construction of this Order are (1) the past history of the Department in allotting members of these tribes or bands without adoption into the Quinaielt tribe or prior residence on any reservation, many of the petitioners being direct descendants of these allottees and (2) the opinion

of the Solicitor for the Interior Department of September 2, 1916, (R. 295-326), and (3) the opinion of the trial court (Part R. 326 to 337).

We earnestly believe that the Executive Order of November 4, 1873, was promulgated in lieu of a treaty with the Indians of Southwest Washington.

> "Where the language of a statute (an Executive Order in these cases) is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy." *Smith v. Townsend*, 148 U. S. 490.

And being in lieu of a treaty it should be treated as a compact between the Indians and the Government. The consideration on the part of the Indians was the valuable territory and fisheries taken from them. It should be interpreted liberally in favor of the Indians. Certainly it should not be completely disregarded.

The General Allotment Act of February 8, 1887

(24 Stat. L. 388, 25 U. S. C. A. c. 9, Sec. 331, et seq.)

The lower court held that these cases came under the Special Allotment Act of March 4, 1911.

(36 Stat. L. 1345) (Appendix "F"). However we have always contended that petitioners are entitled to allotments under the General Allotment Act of February 8, 1887, also.

The Circuit Court of Appeals holds that this allotment act makes residence upon the reservation a prerequisite for allotment. This conclusion is based upon Section 1 of the Act, the Court saying:

> "It will be observed that this section requires that the tribe or band of Indians be located upon the reservation and that the individual seeking allotment be located thereon. As was said by Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, in *Lemieux v. United States*, 15 Fed. (2nd) 518, "No case has been cited, and we have been unable to find any which holds that a tribal Indian, living apart from the tribe and off the reservation, is entitled to an allotment under section 1 of the Act of 1887, and the language of that act seems to preclude such a holding." No one of the appellees resides upon the Quinaielt Reservation. This fact would justify and require the Secretary of the Interior to deny their applications for allotments under the general allotment law and would require a denial of their application by the District Court."

Thus the only authority for this construction

is the dicta in the case of *Lemieux v. United States*, 15 Fed. (2nd) 518. We have already discussed this case (page 172), but we will mention that Judge Sanborn referred to "a tribal Indian living apart from his tribe and off the reservation." The petitioners, while living off the reservation, are not in any true sense living apart from their tribes. The little settlements in which they live are the homes of many other Indians of their own tribes or bands, and many of these Indians with whom petitioners are associated have been allotted on the Quinaielt Reservation while living in the same settlements.

The Circuit Court of Appeals does not construe the entire act and particularly it does not construe Section 6 of the act set out as Appendix "A."

It would seem from Section 6 of the act that two classes of Indians are provided for:

First: The act applies to Indians who have been allotted under any law or treaty, or under the act itself.

Second: The act applies to Indians who have not been allotted, whether such Indians have or have not been members by birth or otherwise of any tribe of Indians. It grants to both classes the rights, privileges and immunities of citizens, "*without in any manner impairing or otherwise affecting the*

right of any such Indian to tribal or other property."

The United States Supreme Court, so far as we have been able to determine, has never construed the Act of February 8, 1887, (24 Stat. L. 388, 25 U. S. C. A. c. 9, Sec. 331 et seq.), in its entirety and has never passed upon Section 6. It seems to us that Section 6 is a savings clause, the purpose of which is to protect the rights of Indians who, though living as Indians, do not reside upon a reservation.

However, the Act of February 8, 1887, has been construed by the Department in granting allotments before and after March 4, 1911, to a great many Indians who never resided upon any reservation (R. 466). In as much as the tribes or bands of Southwestern Washington have not been able to go upon their reservation because of its uninhabitable condition, the strict and technical construction of the Circuit Court of Appeals on the question of residence is neither reasonable nor just. The Supreme Court of the United States, in the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and this same Circuit Court of Appeals in the case of *Bonifer v. Smith*, 166 Fed. 846, construing the Umatilla Allotment Act, held that residence was not a prerequisite for allotment. There is very much more reason why the same liberal rule should be

applied to the construction of the allotment acts under consideration in the present cases.

ACT OF JUNE 7, 1897.

This act provides as follows:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right." (30 Stat. L. 90 Sec. 1) (25 U. S. C. A. Sec. 184).

This act was in fact a piece of remedial legislation enacted to correct the inequity of the Act of August 9, 1888, (25 Stat L. 392), and to give the children of a white man and an Indian woman recognized by the tribe the same rights to tribal property as were given to the children of a white woman and a recognized Indian man under the last cited act. Until the decision of the Circuit Court of Appeals in the present cases, it had always been admitted that a child of a mixed blood marriage was entitled to his rights in tribal property if this fa-

ther was a recognized Indian. The discussion in the Indian appropriation bill for the fiscal year 1898 clearly sets this out, (Congressional Record, 55th Congress, 1st Session, page 1264), also *Waldron v. United States*, 143 Fed. 413, *Bonifer v. Smith*, 166 Fed. 846, Sioux Mixed Blood Cases, Opinions of the Attorney General, Vol. 20, pp. 742-743; *Pennock v. Commissioners*, 103 U. S. 44; *Jones v. Meehan*, 175 U. S. 1; *Vezina v. United States*, 245 Fed. 411; *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, *United States ex rel. Besaw v. Work*, 6 Fed. (2nd) 694.

The Circuit Court of Appeals ruling upon this act is vague, indefinite and not in accordance with the facts in these cases. This is one of the most serious [redacted] errors.

For example, in the opinion of *United States v. Halbert* (R. 643), 38 Fed. (2nd) page 798, it is said:

> "We do not understand that the appellees rely on this statute as applicable to most of the applicants for the reason that they are not the children of an Indian woman and a white man, but they are grandchildren, and therefore do not come within the provisions" of the statute citing *Pape v. United States*, 19 Fed. (2nd) 219; *Oakes v. United States*, 172 Fed. 305).

The record clearly shows that *both the grand-*

father and grandmother of a large number of the applicants whose rights the Court was therein considering were Indians. This will be shown in our discussion of the individual cases.

We call the attention of the Court to the fact that, in the four Halbert cases, Nos. 141, 142, 148 and 144, the *father* of petitioners in each case is a duly enrolled and allotted Quinaielt Indian, and, if we are to follow the rule cited by the Court in *Pape v. United States*, 172 Fed, 305, they follow the status of their father, not their mother.

The Circuit Court of Appeals does not attempt to decide the cases, No. 146, *Lulu M. Elliott et al v. United States;* 147, *Mary Barichio Petit et al v. United States;* 148, *Dewey Barichio et al v. United States;* 145, *Rose Peers Pickernoll et al v. United States*, by a review of the facts, but decides these cases under the general decision in the case of *Halbert v. United States*. Had that Court gone into the facts in the above enumerated cases, that Court could not have come to the general conclusion that it did, for in these cases both the *father* and the *mother* are *Indians*.

When the Circuit Court of Appeals cites the Oakes case in this connection, that Court again overlooks the fact that, in the case of these petitioners, none have ever abandoned their tribal habitat or status as Indians.

In case No. 151, *Agnes Reubens et al v. United States*, the Court again erroneously applies the Act of June 7, 1897, (30 Stat. L. 60-90) (Appendix "E"). The facts in this case are: That the mother of the petitioners is a duly recognized, enrolled and allotted Quinaielt Indian, and the father of the petitioners is a white man. They were married in the year 1890 (R. 491), long prior to the passage of the Act of June 7, 1897, (Appendix "E"). These petitioners are clearly within the rule as announced in the case of *Oakes et al v. United States*, 172 Fed. 305.

In case No. 152, *Virginia Walkowsky v. United States*, the Circuit Court of Appeals again falls into error on the facts admitted. The decision of that Court (R. 646-649) finds the mother of petitioners a half blood Indian, when in fact she is a full blood. The Court first finds she is a Chinook Indian following the tribe of her father, then finds her mother to be a Chinook Indian, after first finding her mother to be a Lower Chehalis Indian. Though her mother may have become a Chinook by her marriage to Mrs. Walkowsky's full blood Chinook father, nevertheless Mrs. Walkowsky was a Lower Chehalis "by blood and not by adoption." Mrs. Walkowsky was unnecessarily adopted into the Quinaielt tribe before these children were born. She was a Lower Chehalis by blood. The Lower Chehalis are enrolled with the Quinaielts and by

stipulation are entitled to allotment (R. 441). In any event the mother of the petitioners was married to the father of the petitioners, a white man, January 9, 1893 (R. 521). The Circuit Court of Appeals cites the Oakes case in this connection. How that much abused decision is a bar in this case, is beyond our power to imagine. In this Walkowsky case we have a full blood Indian woman, (herself and eight of her children allotted), applying for three other children born of a marriage consummated prior to 1897. None of petitioners ever abandoned their tribal habitat, mode of living or status as Indians. All are additionally protected by the Executive Order of 1873. We ask the Court to contrast the facts in this case with the facts in the Oakes case, and we have no doubt but the Court will agree with us that the Oakes case is a much abused decision urged as a bar under every conceivable set of conditions and circumstances.

In cases 149, *Edna May Elliott et al v. United States;* No. 150, *Charles G. Elliott v. United States,* the fathers of petitioners are Indians, and under the ruling of *Pape v. United States,* 19 Fed. (2nd) 219, petitioners follow the status of their fathers, enrolled and allotted Indians (R. 255).

In case No. 153, *Lizzie Rolfson et al v. United States,* it seems to us that the Circuit Court of Appeals goes to the extreme in denying her two chil-

dren born of a marriage with a white man, said marriage having taken place in the year 1887. The trial court finds that Lizzie Rolfson from birth was a recognized member of the Lower Chehalis tribe of Indians (R. 393 and 652). It was further stipulated that Lower Chehalis Indians were entitled to allotments (R. 421). Her two children born of a marriage to a white man prior to June 7, 1897, are denied allotments because they are American citizens (R. 651).

While the case of *Oakes v. United States*, 172 Fed. 305, is not cited in this connection, it is by inference cited by the reference to the Walkowsky case. We submit that, under the facts in this case, these petitioners are within the ruling in the Oakes case, and squarely within the ruling of the cases of *Bonifer v. Smith* (166 Fed. 846), *Vezina v. United States* (245 Fed. 411), *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, and *United States ex rel Besaw v. Work*, 6 Fed. (2nd) 694. From the latter case, the facts in the instant case cannot be distinguished.

The only remaining case is that of No. 154, *Mary Francis Provpe et al v. United States*. The difficulty in denying these petitioners is best shown by the samewhat extended comment upon this case (R. 653 to 670).

In this case it is to be noted that petitioners are children of an Indian father and mother, the

father a Cowlitz and the mother an Upper Chehalis, married long prior to the Act of June 7, 1897. Mary Francis Provoe, the mother of petitioners and herself a petitioner, is admitted to be an Upper Chehalis Indian, now living with her family on the small Executive Order Chehalis Reservation. Another of the petitioners lives at Moclips, Washington, just outside of the Quinaielt Reservation (R. 597), the home of many members of the Quinaielt Tribe (R. 413).

We have discussed the case at length in other parts of this brief, and there is little more to be said here, except perhaps to show the inconsistency of the Circuit Court of Appeals in stating the children of Mary Francis Provoe must follow the status of their Cowlitz Indian father (R. 656), then declining to follow that rule in cases Nos. 141, 142, 143, 144, 145, 146, 147, 148, 149 and 150.

The ruling of the Circuit Court upon the theory of adoption in this case, is discussed at length on pages 128 to 140. We have also heretofore commented upon the Court's failure to construe the Executive Order of November 4, 1873, (Appendix "C"), in connection with this case.

The application of the Act of June 7, 1897, (30 Stat. L. 60-90) (Appendix "E"), to these cases by the Circuit Court of Appeals is so obviously erroneous that it must be concluded that the record was but hastily examined.

Act of March 4, 1911
(Appendix "F")

We have contended that petitioners are entitled to allotment under not only the Executive Order of November 4, 1873, and the Act of February 8, 1887, but also under the Act of March 4, 1911. The trial court held that, in view of the negotiations at Cosmopolis in which the Chinook, Cowlitz, Upper and Lower Chehalis and the Quinaielts took part and which negotiations culminated in the Treaty of July 1, 1855, and January 25, 1856, it was not a strained construction to assume that those first named tribes, though they did not actually sign the treaty, were the "other tribes of Indians affiliated with the Quinaielts and the Quileutes in the treaty" spoken of in the Act of March 4, 1911. This contention is fully set out in the opinion of the trial court (R. 326-337). To those of us who are acquainted with the History of Washington Territory, it seems very reasonable.

It was certainly the most equitable ruling for it allots only those tribes who had no allotable reservations, and excludes all the tribes around Puget Sound and the Straits of Juan de Fuca which had reservations (See Map). The Shoalwater reservation is but a section or so of land. We have shown in the statement of the case that the Chehalis Reservation at Oakville was not allotable. There are references to it in the early reports. Before the

promulgation of the Executive order of 1873 (Appendix "C"), the local officers believed it was intended for the tribes that did not sign the treaty. However, only a small part of the Chehalis Indians ever lived upon it and it was not formally set aside by Executive Order until 1886. By Executive Order of October 1, 1886, 471 acres were set aside for school purposes, and the remaining 3,753 acres, as originally surveyed, were abandoned to Indian homestead entry. Thirty-six Indians, not ancestors of petitioners, made homestead selections covering all the land. (Handbook of American Indians, Vol. II. Bureau of American Ethnology Bull. 30, p. 387). Respondent does not contend that it has any bearing on these cases.

The Circuit Court of Appeals does not share the trial court's view that the Chinooks, Shoalwater, Cowlitz and Upper and Lower Chehalis Indians, who met with the Quinaielts at the Cosmopolis Treaty negotiations, were affiliated with the treaty signing Indians within the meaning of the Act. The Court says:

> "Moreover, it should be noted that there is no evidence as to what tribes were represented at the final meeting at Olympia, nearly six months after the Cosmopolis negotiations were had, other than the fact that the treaty was

signed by the Quinaielt and Quileute Indians." (R. 664).

As a matter of fact, the treaty itself shows that the Quinaielts signed the treaty on the Quinaielt River, and it was signed by the Quileutes at Olympia eleven months after the Cosmopolis negotiations. This raises an interesting question. A number of Indians testified for both parties in these cases and referred to the Quinaielt and Quileute Treaty. The only part of the treaty any of them could tell about was the Cosmopolis meeting. A few headmen signed the treaty on the Quinaielt River on July 1, 1855, about three months after the negotiations, but the Indians to this day do not seem to be aware of that fact. It appears that the minds of the Quinaielt Indians and Governor Stevens met at Cosmopolis, and that the subsequent signing was a mere formality. So to the Indians and the whites also (R. 385, 386, 440-441) the Quinaielts and Quileute treaty and the Cosmopolis negotiations are synonymous. The Cosmopolis negotiations are unquestionably better known to the white people of the State of Washington than any other Indian treaty meeting in the history of their state. Judge Swan's book, The Northwest Coast, is the best known and most authoritative work dealing with the western part of Washington Territory during the period. His book made the Cosmopolis negotiations famous in local history. In

view of these facts, it seems perfectly logical that Congress had in mind the Indian tribes of Southwestern Washington who had met at Cosmopolis when it used the expression "other tribes in Washington who are affiliated with the Quinaielt and Quileute tribes in the Treaty of July 1, 1855, and January 25, 1856."

However, it should not be necessary for this Court to decide that question. Whether or not the Chinooks, Cowlitz and Upper Chehalis Indians were affiliated with the Quinaielts and Quileutes in the Treaty, they are nevertheless entitled to allotment under the construction of that act placed upon it by respondent. They are entitled to allotments under the Executive Order of Nov. 4, 1873, and the General Allotment Act.

Agent Roblin, witness for defendant, states that the Executive Order of November 4, 1873, the General Allotment Act of February 8, 1887, and the Act of March 4, 1911, should be read together R. 446). He also says that residence upon a reservation is not necessary for allotment under the Act of February 8, 1887 (R. 443). In view of the letter of Secretary Ballinger, (R. 641) and some of the other correspondence set out in the Opinion of the Solicitor for the Interior Department (R. 295-326), the following construction of the Act of March 4, 1911, may be the correct one:

The Act of March 4, 1911, was passed to clear up a particular local situation which had become confused and not to define all the tribes who were entitled to allotment on the Quinaielt Reservation or to exclude those not named. The very wording of the Act suggests this. Between 1906 and 1910 allotments were being made to Chinooks, Cowlitz, Quinaielts and Upper and Lower Chehalis (R. 443, 444). It does not appear from Agent Roblin's testimony that any Hoh, Quileute or Ozette Indians were allotted between 1908 and 1910 (R. 443, 444) although possibly some may have been.

It is to be noted that the Hoh, Quileute and Ozette Indians were provided with separate reservations of their own. These reservations were small ones, not more than a section to a section and a half each. They were set aside to protect the sites of their principal villages.

Prior to the passage of the Act of March 4, 1911, the Indian Office in Washington advised the Agent:

> "No Hoh or Quileute Indian residing upon an Indian Reservation set apart for such Indian's use is entitled to an allotment on the Quinaielt Indian Reservation . . . . But if members of the Quileute and Hoh tribes are affiliated with the Quinaielt Indians, *and are not residents upon reservations* set aside for their particular

use, they are entitled to allotments with the Quinaielts." (R. 303. (Italics ours).

This instruction added confusion to the situation as the Hoh, Ozette and Quileute reservations were not of sufficient size to allot more than 15 or 18 Indian altogether, that is, 5 or 6 on each reservation. So to clear up this local situation the Act of March 4, 1911, was passed.

This construction is exactly borne out by the testimony of Allotting Agent Roblin (R. 446). It should be noted that above instruction shows again the policy of the Department in allotting *non-reservation* Indians.

But the wording of that act was not entirely satisfactory. The expression "other tribes of Indians who are affiliated with the Quinaielt and Quileute tribes in the Treaty of July 1, 1855, and January 25, 1856," was not altogether clear. The trial court, including the Cosmopolis negotiations as part of the treaty, held that the Upper and Lower Chehalis, the Chinooks and the Cowlitz were affiliated with the Quinaielts and the Quileutes in the treaty. The Circuit Court of Appeals, accepting the report of the clearly not-representative Council of 1918, held that they were not affiliated.

Others held the view suggested in the Opinion of the Solicitor for the Interior Department. The Act uses the word "ARE" instead of "WERE."

The Solicitor, after holding that all the tribes "south of the Neah Bay or Makah Reservation to the mouth of the Columbia River" and those affiliated with them should be allotted (R. 324), says:

> "The Indian tribes along the Pacific Coast described as 'Fish-eating Indians' ARE more or less affiliated, although divided into numercus tribes or bands." R. 325). (Capitals ours).

(For the definition of fish-eating Indians by Superintendent of Indian Affairs see R. 297). All the petitioners live between the Makah Reservation and the Columbia River and under the ruling of the Solicitor should be allotted regardless of whether or not they were affiliated with the Quinaielts and Quileutes in the treaty.

To further aid the Court in the construction of this Act we point out that the Indians and the local Indian agent on the ground feared that the Act of March 4, 1911, might be used to exclude many whose reservation rights had never, prior thereto, been questioned. As a result, on April 4, 1912, they had introduced House Bill 22868, which would have completely clarified the situation (R. 320). But, upon the introduction of this bill, the Indian Office wrote:

"The question may be seriously considered at

this time whether the Act of March 4, 1911, supra, was necessary. That is, whether authority did not already exist under the treaties mentioned and the Executive Order of November 4, 1873, to allot on the Quinaielt Reservation Indians of the tribes specifically mentioned in the act of March 4, 1911. It is not seen, therefore, how this act can be construed or regarded as in abrogation of or placing any limitation on the rights of various so-called fish-eating Indians of the Pacific Coast to allotments on the Quinaielt Reservation. The act should be read in conjunction with the prior treaties and the executive orders rather than using it as a basis for excluding from allotment on the Quinaielt Reservation members of the fish-eating tribes not specifically named in its provisions or who cannot be shown as clearly coming within the phrase 'or other tribes of Indians in Washington, who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's (300) correction) 1856' . . . .

"In view of the treaties, executive orders and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary." (R. 319-321).

This opinion was so satisfactory to everyone that the bill was dropped. After preventing the passage of that bill, respondent comes before a court with very poor grace in asking for the denial of these allotments on the ground that the fish-eating tribes or bands to which petitioners belong were not affiliated with the Quinaielts and the Quileutes in the Treaty of 1855 and 1856.

Let us see how the Circuit Court of Appeals treated the Act of March 4, 1911, (Appendix "F"). That Court, first of all, overlooked the local situation, the allotting history of the reservation, and the testimony of government's own witnesses, and held that residence upon the Quinaielt Indian Reservation was a prerequisite to allotment under the General Allotment Act of February 8, 1887. This was done solely on the dicta in the case of *Lemieux v. United States*, 15 Fed. (2nd) 518. The Court then took up the Act of 1911 and held that its only purpose was to substitute residence upon one of the little northern reservations for residence upon the Quinaielt. But the Court, after it held that the Chinook, Cowlitz and Chehalis were not affiliated with the Quinaielts and the Quileutes in the treaty of 1855 and 1856, and since the one-section Chehalis Reservation at Oakville and the one-section Shoalwater Bay Reservation were not mentioned in the Act, says that residence on the last two named

reservations could not be substituted for residence on the Quinaielt Reservation. This makes the Act of March 4, 1911, an exclusion act, a construction diametrically opposite to that of the Department in 1912 (R. 320) which prevented the legislation that would have clarified the whole situation.

Tracing the reasoning of the Circuit Court of Appeals, in the Halbert opinion, the Court says:

> "Under the general allotment act the Indians to whom this reservation was made and who resided thereon were entitled to allotments therefrom. Under the same law Quileute Indians residing upon the Quileute Reservation, Hoh Indians residing upon the Hoh Reservation, Quit Indians residing upon the Quit Reservation, were entitled to allotments from these reservations specially set apart for their use, but these reservations were so small that it would be impossible to give each Indian residing thereon the acreage authorized by the general allotment law. By moving from these small reservations to the Quinaielt Reservation the Indians for whom this reservation was established would be entitled to an allotment under the general allotment law. The Act of March 4, 1911, supra, however, provided that the Indians described in the act 'who may elect to take allotments on the Quinaielt Reservations, rather than on the

reservation set aside for these tribes, should have an allotment made to them on the Quinaielt Indian Reservation.' These allotments the Secretary was directed to make 'under the provisions of the allotment laws of the United States.' It is a general rule of law that a party is put to his election only when he has two inconsistent rights. In view of this fact it must be apparent that the Indians who were by this act given a right of election as to whether they would take an allotment upon the special reservation set apart for them or from the larger reservation, must have had a right to selection upon the smaller reservation. In order to have a right to selection upon a smaller reservation it is necessary that the individual be located thereon. The right given to such an Indian by the Act of March 4, 1911, supra, was the right to select an allotment upon the larger reservation without the necessity of residence on that reservation. The effect of this legislation then is to declare a residence upon one of these smaller reservations equivalent of residence on the larger reservation." (R. 639).

We call the Court's attention to the fact that there is no Quits Reservation. This is another example of the inaccuracy of that opinion on questions of law and fact.

In regard to the narrow construction of the word "elect" in the act, would it not be just as fine reasoning and more in keeping with the facts to say that the Hoh, Quileute, Ozette, Chehalis and Shoalwater Indians, who had these small reservations, protecting their village sites (R. 642), (except possibly the Chehalis Reservation which was almost abandoned) had rights on these reservations, though, in order to make a living, they did not actually live upon them? In other words, we mean that they had rights upon these small reservations because they were members of the bands or tribes that lived upon them and for which they had been set aside, and could elect to take allotments on the large Quinaielt Reservation rather than upon the small one-section reservations set apart for them. This would be in accord with the instruction quoted on page 114. The United States Supreme Court in the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and this same Circuit Court of Appeals in the case of *Bonifer v. Smith*, 166 Fed. 846, held that the Umatilla, Cayuse and Walla Walla Indians had rights to allotment on the Umatilla Reservation, even though they did not live upon the reservation and even though the Umatilla Allotment Act, on its face, seemed to demand residence on a reservation much more than any of the acts in the present cases. In the case of *Bonifer v. Smith*, 166 Fed. 846, an allotment was allowed

a mixed blood Indian residing at the Dalles, Oregon, *150* miles from the reservation, outside the tribal habitat and outside of the territory ceded to the government in the treaty.

The Circuit Court of Appeals has a difficult time construing the term "other tribes affiliated, etc." In the Provoe opinion (R. 661), the Court says:

> "The general words 'other tribes affiliated' in the statute are limited by the special words in the statute, naming particular tribes immediately preceding the general phrase 'other tribes,' etc.; under the familiar rule of statutory construction of *ejusdem generis*, to other tribes related or affiliated, as the Hoh, Quileute and Ozette Tribes are, or were affiliated with the Quinaielt and Quileute Tribes (*Hills vs. Joseph*, 229 Fed. 865, 868, 869). The Hoh Indians were a band of Quileute Indians living at the mouth of the Hoh River, about fifteen miles south of Lapush, the main seat of the tribe on the west coast of Washington." (In the Halbert opinion the Court says that the Hoh Indians are a band of the Quinaielts, doubtless an inadvertence. Correction ours). "In 1905 they had a population of 62 (No. 1 Hand Book of American Indians, Bureau of Ethnology, p. 556, published in 1910). The Quits similarly were a

subdivision of the Quinaielt Tribe. It would thus appear that the Quits were affiliated with the Quinaielt Indians in the same way that the Hoh Indians were affiliated with the Quileute Indians. That is to say, both the Hohs and the Quits were tribes or bands of tribes signing the treaty and were by the terms of the treaty bound thereby (See treaty quoted in Halbert v. United States, supra, 12 Stat. L. 971). The phrase in the statute, 'other tribes affiliated,' etc., is evidently applicable to the Quit Tribe and this fact gives sufficient meaning to the phrase to justify its use and satisfy its terms, even if there were no other tribe similarly affiliated with the Quinaielt and Quileute Tribes in the treaty and not specifically mentioned therein" (R. 661).

Thus the Court is very careful to set out its rules of construction, but in searching for some tribe not mentioned by name, in order to explain the use of the term "other tribes of Indians in Washington," all it can find is one tribe, the Quits. Why was the plural "tribes" used for just one band? The absurdity of such a construction is much more manifest when we realize that the Quits are a band of the Quinaielts whose principal village is Queets on the Quinaielt Reservation, and, being a part of the Quinaielt tribe covered by the

treaty, their rights on the reservation have never been questioned.

Is not the construction of the trial court (R. 326-337) much more simple and reasonable? The trial court does just what Allotting Agent Roblin, witness for respondent, says should be done (R. 446). He construed the Executive Order of 1873 and the Act of March 4, 1911, in "conformity one with the other," and "not for the purpose of one repealing the other" (R. 446), and allotted these members of the tribes of Southwestern Washington. The Circuit Court of Appeals refuses to consider or construe the Executive Order of November 4, 1873, and gives no reason for its refusal. This we believe is error.

Respondent criticised the lower court for construing the word "or" as "and." The expression "or other tribes of Indians in Washington, etc." would be meaningless if that were not done.

> "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and' and again 'and' as meaning 'or.' *United States v. Fisk*, 18 U. S. 243, 3 Wall. 445.

The opinion of the trial court reconciles the treaty, the Executive Order, and the Act of March 4, 1911.

"Other acts on the same subject, and the connection of the words in the act in question, may be reviewed to determine the true intent of a provision in an act of Congress." *United States v. Farden*, 99 U. S. 10.

"Where there are two acts relating to the same subject, effect is to be given to both if practicable." *Chicago, Mil. & St. Paul Ry. Co. v. United States*, 127 U. S. 406.

The construction of the trial court is in conformity with the opinion of the Solicitor for the Interior Department (R. 295-326). It is by far the more equitable of the two constructions. It gives allotments to the members of all the tribes for whom the reservation was set aside.

"The interpretation of a statute is often to be sought from the surrounding circumstances and preceding history." *Guarantee Ins. Trust & S. D. Co. v. Sellers*, 123 U. S. 276.

The construction of the Circuit Court of Appeals would exclude all the tribes south of Grays Harbor. If that construction is the correct one, the whole policy of the Department since 1906 has been wrong and the Quinaielt Indians have a just claim against the government for the value of the 1,000 allotments already given to non-reservation Indians, and for the value of the several hundred

allotments given in the past without adoption to members of the tribes of Southwestern Washington.

"Practical construction given to laws should have great weight in determining doubtful questions." *Bank of the United States v. Halstead*, 6 U. S. 264, 10 Wheat. 61.

"Practical interpretation of ambiguous statute by executive department charged with its administration is entitled to highest respect and, if acted on for a number of years, will not be disturbed except for very cogent reasons." *Swendig v. Washington Water Power Co.*, 265 U. S. 322.

The following record citations show that many of the witnesses for both parties who had been allotted on the Quinaielt Reservation never have resided upon any reservation. Many of them were never adopted into the Quinaielt tribe (R. 398, 403, 405, 408, 411, 413, 420, 421, 422, 425, 466, 472, 485, 488, 491, 507, 513, 521, 522, 526, 534, 569, 572, 573).

Finally the construction of the trial court gives effect to the Executive Order of November 4, 1873, and to the history of the Indians of Washington, and in some measure compensates the remnants of

the tribes or bands of Southwestern Washington for the territory taken from them.

> "In construing the terms of a statute, courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions." *Texas and P. R. Co. v. Inter-State Commerce Com.*, 162 U. S. 197, 218.

But we have shown that, regardless of whether or not the Cosmopolis negotiations be considered as a part of the treaty of 1855 and 1856 (though they in equity should be), the fish-eating Indians of Southwestern Washington are entitled to allotment on the Quinaielt Reservation under the Department's own interpretation of the Executive Order (Appendix "C") and the General Allotment Act of February 8, 1887 (Appendix "D").

The allotment acts would fall far short of accomplishing their purpose in this locality if the construction of the General Allotment Act and the Act of March 4, 1911, as handed down by the Circuit Court of Appeals, be sustained.

Must Petitioners Be Adopted Into the Quinaielt Tribe to Qualify for Allotments?

The Circuit Court of Appeals denies petitioners' allotments, not only because they do not reside upon the Quinaielt Reservation, but also because they have not been adopted into the Quinaielt Tribe. The District Court held that it was sufficient that petitioners are recognied members of the tribes or remnant bands for whom the reservation was set aside. The theory of the Circuit Court of Appeals on the question of adoption is best expressed in its decision in the case of *United States v. Rolfson et al.*, 38 Fed. (2nd) 806, and at page 807 it is said:

> "The children of Lizzie Rolfson are American citizens and are not entitled to an allotment unless they were adopted by the tribe."

In coming to the above conclusion the Court first ignores the Act of Congress of June 2, 1924, (C. 223, 43 Stat. L. 253) (Appendix "G"). This error or oversight is so apparent that no argument is necessary.

Secondly, the Court overlooks the rules and regulations of the Department of the Interior made in the year 1904 with amendments thereto (Appendix "H"), which direct that the children of a duly enrolled and allotted parent or parents are

entitled to enrollment and allotment without any necessity of adoption.

Under these allotment instructions and the policy of the Department of the Interior for the past twenty-six years, the petitioners in the cases No. 141, Hilary Halbert Jr. et al.; No. 142, Rich Harbert; No. 143, Vernon Sidney Halbert; No. 144, Sidney E. Halbert; No. 146, Lulu M. Elliott et al.; No. 147, Mary Barichio Petit et al.; No. 148, Dewey Barichio et al.; No. 149, Edna May Elliott et al.; No. 150, Chas. G. Elliott et al.; No. 151, Agnes Reubens et al.; No. 152; Virginia Walkowsky et al.; No. 153, Lizzie Rolfson et al.; are all entitled to enrollment and allotment, and the theory of adoption cannot possibly enter into the consideration of the matter as the blood status of these petitioners has been fixed, and to say that the child of a duly enrolled and allotted Quinaielt Indian must further be adopted as a Quinaielt Indian is contrary to all established rules of law and precedent.

In this case of Virginia Walkowsky et al., No. 152, where the mother and eight of her children were enrolled, allotted and unnecessarily adopted into the Quinaielt Tribe, and her three younger and after born children of the same father were denied allotment, a peculiar situation prevails. To show how contrary to law and the ruling of the Department of the Interior and the Department

of Justice is this opinion, we will cite to the Court petitioners' Exhibit No. 15, which is a ruling of the Department of the Interior, dated December 16, 1925, holding that the after born children of an Indian adopted into the Quinaielt Tribe are entitled to an allotment without further action of the tribe (R. 616).

Again in the case of *Frank Mounts et al. v. United States*, District Court, Washington, No. 3 38, wherein the Attorney General of the United States upon November 6, 1929 (Appendix "J"), recommended a consent decree in favor of the plaintiffs, the minor children of Frank Mounts, it is said:

> "Investigation of this matter develops the fact that Frank Mounts, the father of the plaintiffs, was enrolled by adoption and his adoption and enrollment was approved August 30, 1909. The oldest of the plaintiffs is 19 years of age. It is clear, therefore, that all the plaintiffs were born after the adoption of their father into the Quinaielt Tribe of Indians. It further appears that these people never resided upon the Quinaielt Reservation."

In the face of the foregoing, we cannot understand by what theory and reasoning the three minor children of [illegible]ate Walkowsky Weiss are denied allotment.

The Circuit Court of Appeals had the ruling of December 16, 1925, (Plaintiff's Exhibit No. 15), before it in the form of an exhibit at the time it considered these cases, but in justice to that Court we will state that it did not have the Mounts decision before it as we were not advised of this decision until after the cases were briefed and argued in the Circuit Court of Appeals. The ruling, however, was before that court in the petition for rehearing.

The Circuit Court of Appeals confuses recognition with adoption. In the cases heretofore enumerated by us, there was no necessity of either recognition or adoption, as the blood status of all these petitioners had been fixed. However, there is a vast difference between recognition and adoption, as outlined by the testimony of Allotting Agent Roblin heretofore noted, and he states that recognition in form is valid and, when given, the persons recognized are entitled to their rights to allotment (R. 448-449).

To only two of these cases could the question of adoption possibly apply. These are the cases No. 145, Rose Peers Pickernoll et al., and No. 154, Mary Francis Provoe et al. We have heretofore shown and will hereafter show that even in these two cases there is no necessity for adoption. In the Pickernoll et al. case, both parents are Indians,

and mother are Indians and both father and mother "fish-eating Indians of the Pacific Coast" and "other Indians in that locality" under the Executive Order of November 4, 1873 (Appendix "C"), and are members of "other tribes affiliated" under the Act of March 4, 1911 (Appendix "F").

In the Provoe case not only do petitioners qualify as above, but, furthermore, they were in the year 1912 recognized by the Quinaielt tribe (R. 586, 587), and remained on the roll until 1918 or 1919 when Agent Roblin, according to his own testimony, struck them from the roll without notice. He says:

> "That he was very particular not to notify the members of the Provoe family of that meeting" (R. 607).

It is also a fact that this action was his own idea and he had not been instructed by the Department of the Interior not to notify the parties dropped from the roll (R. 608). That this action was without due process of law scarcely need be mentioned.

Bisek v. Bellanger, 5 Fed. (2nd) 994;

Work v. United States ex rel. Gouin, 18 Fed. (2nd) 820.

The Circuit Court of Appeals goes to the extent of saying that, even though both the father

are enrolled and allotted on the Quinaielt Indian Reservation, their children would have to be adopted into the Quinaielt Tribe. (Case of *Lulu M. Elliott et al. v. United States*, No. 146). The same is true of the Petit family, Case No. 147 (R. 130-136). The Court of Appeals gives no detailed discussion of this case but decides it under the head of the *United States v. Halbert et al.* (38 Fed. [2nd] 795-799).

An examination of the record will show that the Circuit Court of Appeals, in holding that petitioners must be adopted by the Quinaielt tribe of Indians, overlooked the particular local situation here existing, the Executive Order of 1873, the authentic records in the cases, and the admitted facts therein.

The Court, in denying allotments to some of the petitioners, apparently accepts what counsel for respondent urges as "the basic ancestry theory." This theory ingeniously conceived by counsel is somewhat as follows:

"The petitioners are to be denied allotments. We cannot as a bar call forth the non-residence defense, as the tribes for whom this reservation was set aside, and 1,000 Indians already allotted, have never lived thereon owing to its uninhabitable condition until cleared; nor can we refer to the immediate ancestry, as in most cases the parent or par-

ents are allotted upon this reservation, but we can go back to the last ancestor who was allegedly recognized as a member of one of these bands or tribes, or to some full blood Indian. We will then stop the line of Indian descent the moment that ancestor marries into the white race, no matter when, or under what condition, and no matter if in a following generation both the mother and father of the applicant are Indians, and thus limit the Indian status to the full blood Indian ancestor, and that person's children. Thus only the full blood Indian and his or her children may qualify. We will do this in spite of the Act of June 7, 1897, and rely upon the case of *Oakes et al. v. The United States*, 172 Fed. 305, as sustaining this position. We will assume that the fact that the applicants in the Oakes case moved to St. Paul and cast their lot with the white race was an immaterial factor in that case. In the face of the census rolls, which carry the names of some petitioners and their parents and relatives (R. 433, 452), we will answer that the census rolls are inaccurate and not complete. In the face of the allotment roll containing the names of the parents of 95 per cent of the petitioners, we will answer that the allotment roll is not a tribal roll in the sense of showing who are the Indians entitled to allotments (R. 433, 452). We have no roll that does show this, but we can go back two, three or four generations, back to the

days when these bands of Southwestern Washington Indians had tribal organizations, or at least somewhat better ones than they have today, and here find a so-called 'basic ancestor,' and limit applicants' right to being a son or daughter of that person who in most instances died before or at the time of the treaty of 1855, fifty-three years before the first allotment on the Quainaielt Reservation."

This was in effect respondent's argument in the Circuit Court of Appeals. This theory would deprive children of mixed bloods of all tribal rights, regardless of degree of blood, or mode of Indian life.

It is, of course, based upon the hypothesis that it would be possible to show a tribal recognition existing that long ago, long prior to the fusing of these various remnants of tribes and bands into one group. The theory of "basic ancestor" is urged, although petitioners live in their original tribal habitat, most of them in what are Indian settlements to this day. It is shown beyond any controversy that these bands and tribes have had no true tribal organization since the Treaty of 1855 (R. 554, 297), and never had tribal organization in the true sense of same as exemplified by the Sioux, Chippewa, Yakima, and many other tribes of Indians throughout the United States.

So under this very flexible theory of counsel for respondent, the Court, in seeking the basic ancestor under the direction of counsel's argument, need only go back just far enough in each case to find that petitioners do not qualify under the theory advanced.

To substantiate this theory respondent cites the case of *Oakes et al. v. United States*, 172 Fed. 305. We know of no other decision more misapplied than this one. It is urged as a bar under every conceivable set of circumstances or conditions. It is apparent that the Oakes case, so far as applicable to these cases, is in favor of petitioners, and we cite it in this connection.

Petitioners herein never abandoned their home, surroundings, mode of life and their Indian status as did the litigants involved in the Oakes case. The facts in these cases are entirely different, for in our cases we have an Executive Order and a Special Allotment Act, both providing for non-reservation Indians, factors wholly absent in the Oakes case.

The theory advanced by respondents in the Circuit Court of Appeals would deny petitioners their allotments by reason of a situation created and allowed to exist solely through the fault of respondent. Had these Indians been placed upon this reservation, or allowed to go thereon, or had

the reservation been made habitable so that they might have made their homes thereon, these petitioners would be reservation Indians. Had the Indians of this locality been cared for on the reservation set aside for their use and benefit, as have the Indians in many other parts of the country, every one of respondent's contentions would be so untenable that no court could even listen to it.

We have shown, and it is admitted, that the parent or parents of many of the petitioners are duly enrolled and allotted Quinaielt Indians. In other cases their parent, parents and relatives are recognized in their settlements and localities in which they live as members of the bands or tribes for whom this reservation was set aside. Many of the petitioners are now recognized by the Indians who live upon the reservation. Others have been so recognized at various times, as set forth in the argument on the facts in the individual cases.

The trial court refers generally to this question of recognition on page 337 of the record; also in the opinion of that court upon pages 338-375 of the record. The statements and conclusions therein follow the facts and show that the lower court did not confuse adoption and recognition as did the Circuit Court of Appeals.

The trial court held that it would not be necessary for the members of the fish-eating tribes of

Southwestern Washington to be recognized or adopted by the Quinaielt Tribe or Council (R. 337), thus giving effect to the Executive Order of November 4, 1873 (Appendix "C"). The ruling is in conformity with the testimony of Allotting Agent Roblin, a leading witness for respondent, who says:

> "That his previous testimony was not based on the assumption that only members of the Quinaielt tribe have the say about allotment of land on the Quinaielt reservation; that it is not his belief that Indians whose names appear on the Quinaielt census roll for allotment, but who live at Bay Center, or elsewhere, would be required to appear before the Quinaielt tribal council for recognition before being allotted; and the same condition prevailing except that the applicant's name did not appear on the census roll of the Quinaielt Agency, it would be necessary for him to show recognition once existing by the tribe to which he claimed membership; that is, it would be necessary for him to show he was a member and recognized as such, of (410) some one or several of the tribes entitled to allotments on the Quinaielt reservation" (R. 448, 449).

It would seem clear from the testimony of Agent Roblin, as set out herein, that none of the

petitioners needed adoption. If petitioners were members of tribes or bands other than those for whom the reservation was set aside, strangers not contemplated by the Executive Order or the Special Allotment Act, or members contemplated who had voluntarily severed themselves from their Indian status, left the tribal habitat of their band or tribe and cast their lot with the white race, as did the litigants in the case of *Oakes et al. v. United States*, 172 Fed. 305, then perhaps a different situation might be presented. There would then be some justification for the ruling that an adoption would be necessary in order to entitle them to allotments. Even this would be doubtful in cases where the parent or parents were duly enrolled and allotted members of the reservation.

The foregoing, we believe, is the well recognized law as established by the decided cases upon this subject, as well as the rules and regulations of the Department of the Interior.

Having, therefore, shown that petitioners are members of the tribes and bands for whom the reservation was set aside, that they are so recognized, that they still live in their original habitat among Indians, as Indians, never having changed their status except through the gradual change coming through civilization, education and enlightenment, that their parent or parents and many

members of their immediate family have been recognized, enrolled and allotted upon this reservation, the so-called theory of "basic ancestor" and rule of adoption as announced by the Circuit Court of Appeals cannot apply.

Various Tribal Meetings of the Quinaielt Indians

The testimony at the trial of these cases developed that there were at least two, or perhaps three, councils of the Quinaielt Indians or of the Indians on the Quinaielt Reservation.

The first was that of April 4, 5, and 6, 1912, called by the Indian Agent, under instructions from the Department to call a general meeting of all the Indians interested, in order to determine, if possible, what persons, in the opinion of the Indians, were entitled to allotments on the Quinaielt Reservation. It was a general council of representative Indians. Many Indians were passed upon favorably by this council, among whom are petitioners in cases 146, 149, 150, 151 and 154 (R. 494, 495, 511, 586, 587, 590).

Nothing further was done, nor any action taken in this matter until some time in the year 1918 when the Department sent Agent Charles E. Roblin to the Pacific Coast. Among other things, he was instructed to investigate the names passed

upon by the Indians in the 1912 Council (R. 480). Agent Roblin then proceeded to interview individual Indians (R. 607) and secured statements and affidavits from them. His plan, according to his own testimony, was not to notify any of the former applicants of his actions, or to let the applicants know that their names would be presented again to the Indians located at Taholah upon the Quinaielt Reservation. In fact he states he took particular pains not to notify them (R. 605, 606, 607).

After Agent Roblin had interviewed various Indians, none, however, being the 1912 applicants (R. 588, 607), he made a summary of the facts as he found them and then submitted this finding with his own recommendation thereon to 60-odd Indians living on the reservation at the village of Taholah (R. 448, 607). Only six out of these 60-some Indians signed the report (R. 480, 481), in which these few Indians recommended that those who were favorably voted upon in 1912 should be dropped from the rolls. At this time there were 746 allotted Indians of this reservation (R. 437).

It appears that but five Indians out of the 746 allotted Indians approved a still further council in the year 1925, and three of these Indians belonged to one family named Mason, a father and two sons (R. 467). The record is rather vague as to this alleged council.

We do not attach any legal significance to any of these so-called councils, as they were but a mere expression of an opinion given by a group of Indians as to the meaning of the Act of March 4, 1911, and the Executive Order of November 4, 1873, relative to the right to allotments."

As was well said in the case of *United States ex rel. Besaw v. Work*, 6 Fed. (2nd) 694, on page 697, speaking of a similar council of Indians on a like matter, which council had in fact been ratified by the Secretary of the Interior:

> "It will be observed that there is nothing before us to indicate that Besaw, who was a recognized member of the tribe in 1849, ever abandoned his tribal rights or was denied recognition of those rights, except what appears from the resolution of the Council of 1904 to the effect that all mixed-blood Menominee Indians who participated in the distribution in 1849 were barred from further participation in tribal property. This action by the council in 1904 amounts to nothing more than a declaration of interest upon their part as against the interest of mixed-blood Menominee Indians. *It cannot be given the authority of law nor is it even evidential of any agreement entered into at the time of the distribution of 1849.*" (Italics ours).

However, it is well to observe that the 1912 Council was a representative council of all the Indians interested, held in an open public manner, where all were present, including applicants and Departmental officials (R. 494, 495).

The 1918 meeting on the other hand was an effort on the part of Mr. Roblin to show that some of the Indians at least ratified his investigation. In calling and conducting the meeting he apparently made his own rules (R. 608). He called 60-odd reservation Indians together and had six Indians sign the report of the meeting. A part of his instructions were:

> "Your report also should include a statement duly certified by you from the Chiefs and head men of the Quinaielt and Quileute tribes as to what bands and 'other tribes of Indians in Washington were affiliated with them in the treaty of July 1, 1855, and January 23, (25) Court's correction) 1856,' and the location at that time of such bands and tribes" (R. 307).

As it was, he called no Quileute headmen and but a small group of Quinaielts. Both the reservation group and respondent were at that time opposed to making any further allotments. See *Tommy Payne v. United States*, 264 U. S. 446.

LETTER OF R. A. BALLINGER (R. 641-643)

After construing the General Allotment Act of February 8, 1887, (24 Stat. 388) (25 U. S. C. A. 331) and the Special Allotment Act of March 4, 1911, (36 Stat. 1345), to require residence on a reservation, the Circuit Court of Appeals continues:

> "If there is any doubt as to the correctness of the foregoing construction of the statute it is set at rest by the report of the Congressional Committee on the act when it was reported to Congress for adoption. This committee report (61st Congress, 3d Session, 1910-1911, House Reports Vol. 2, Miscellaneous 11, Report No. 2152, reported February 11, 1911), incorporated and was based upon a letter from R. A. Ballinger, Secretary of the Interior, to the Chairman of Indian Affairs of the United States Senate, dated February 18, 1910. This report is as follows:" (R. 641).

The Court then quotes the letter or report (R. 641-643). This letter was not introduced in evidence at the trial. Counsel for petitioners had no knowledge of its existence until it appeared in the Opinion of the Circuit Court of Appeals. Doubtless that Court had a right to consider it as it seems to be a contemporaneous document. However, we

have reason to believe that the Solicitor for the Interior Department had this letter before him in 1916 (six years later) when he wrote his opinion (R. 295-326), and must have given it due and ample consideration.

Had the Circuit Court of Appeals examined more carefully the opinion of the Solicitor (R. 295-326), it would not have given this letter so much weight. This opinion was written six years after the letter of Secretary R. A. Ballinger. No one can read the opinion or the correspondence set out therein and reach the conclusion that residence on a reservation was ever considered a requisite for allotment. Not a single letter refers to Indians residing on a particular reservation. The Solicitor concludes:

> "While the Quinaielt reservation is one of the largest west of the Cascade range, it was evidently not intended that all the unattached Indians as far east as that range could secure rights on that reservation. The more reasonable view is that *only the Indians of the tribes or bands on the immediate coast of Washington and those affiliated therewith were contemplated.* The applicants represented by Mr. Bishop alone and belonging to more than 40 different tribes or bands are said to amount to more than 2,000, and the number may reach 3,000" (R. 324).

The wording of the Act of March 4, 1911, (Appendix "F") is absolutely inconsistent with the idea that residence on a reservation was a requisite. The Act reads:

> "to all members of the Hoh, Quileute, Ozette OR OTHER TRIBES IN WASHINGTON who are affiliated," etc. (Emphasis ours).

The Solicitor says:

> "It may be stated here that the word 'affiliated' was apparently intended to refer to the tribe rather than to the individual. The individual Indians affiliated with the tribes on the Quinaielt reservation would have been entitled to allotment there without further legislation. Therefore, the Act of March 4, 1911, could not have been passed for the purpose of declaring rights already existing. The Hohs and Ozettes mentioned in the Act, as well as other tribes in western Washington, have specific reservations set apart for them, and the members thereof in taking allotments would be limited to those reservations but for the Act of 1911. The Indian tribes along the Pacific coast of Washington, described as 'fish-eating Indians,' are more or less affiliated, although divided into numerous tribes or bands" (R. 325).

The record demonstrates that the Department itself has not followed the letter of Secretary R. A.

Ballinger (R. 641-643) so far as it may possibly apply to non-reservation Indians. It has in fact followed the rule laid down in the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and *Bonifer v. Smith*, 166 Fed. 846. The only other authority for the exclusion of non-reservation Indians, as we have said, is the dicta in the case of *Lemieux v. United States*, 15 Fed. (2nd) 518. The decision of the Circuit Court of Appeals at its best is an extremely technical one, based upon the weakest sort of authority, certainly not the type of decision that should be applied to such a class as these petitioners.

Distinction Between These Cases and the Case of Wilbur, etc., v. United States ex rel. Kadrie

We note the recent case of *Ray Lyman Wilbur, Secretary of the Interior, v. United States ex rel. Kadrie et al.*, (30 Fed. [2nd] 989, 281 U. S. 206, decided by this Court April 14, 1930, upon a petition for certiorari. This decision is to the effect that mandamus will not lie against the Secretary of the Interior to require him to place certain names of Indians upon an annuity roll for money payments after the names had been stricken by an order of the Secretary following an opinion by the Solicitor for that Department.

This petition presents no such question. The petitioners are here proceeding under definite acts of Congress giving them the right to sue for allotments and perforce to ask final judgment for their allotments from the court to which they may appeal.

Upon several occasions this Court has had these acts of Congress before it:

In the case of *Leecy v. United States* (190 Fed. 289) (*Appeal dismissed* 232 U. S. 731), the decicion of the Circuit Court of Appeals for the 8th Circuit said:

"'. . . The Act of February 6, 1901, (31 Stat. 760, c. 217) provides:

"'". . . It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that, as allotments must be reported to the Secretary of the Interior for his approval, the absence of his approval would defeat the suit, when, of course, no one would want to bring a suit if he had that approval.

"'The claim of power under sections 441 and 463 R. S., is subject to the same criticism. Why

authorize a suit, if either of the sections conferred upon the Secretary of the Interior or upon the Commissioner of Indian Affairs general authority conclusive on the courts? Certainly Congress did not mean to authorize the bringing of wholly futile actions. A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so.'"

The Act of February 6, 1901 (31 Stat. L. 760 c. 217), had received further construction in the cases of *Sloan v. United States*, 118 Fed. 283, (*appeal dismissed* 193 U. S. 614), where it is said:

"This section was intended to vest the United States Courts with full authority to hear and *determine every question* arising in any suit brought by a claimant to an allotment; *and the fact that such questions have been decided by the land department adversely to the claimant neither affects the court's jurisdiction nor concludes it on any matter of law or fact.*"

Morrison vs. Work, 266 U. S. 481; *Hy-yu-tse*,

mil-kin v. Smith, 119 Fed. 114, and 194 U. S. 401; *Waldron v. United States*, 143 Fed. 413, and cases cited. Also *Sully v. United States*, 195 Fed. 113.

Summary Of Facts In Individual Cases

Cases 141, 142, 143, 144.

In Case No. 141 *Hilary Halbert, Jr. et al v. United States*, Case No. 143 *Vernon Sidney Halbert v. United States*, and Case No. 144 *Sidney E. Halbert v. United States*, the facts are identical. (Statement p. 34). All petitioners were born, reared and now live in the town of Hoquiam (R. 403, 405, 408), originally an Indian village of the Lower Chehalis Tribe (R. 389 and Handbook of American Indians, Part 1, p. 569). The Quinaielt Indian Agency office is now located here, 25 miles from the Quinaielt Reservation (R. 382). Petitioners were carried on Quinaielt rolls until 1919 when for some unknown reason they were, without notice, dropped (R. 409). All petitioners were allowed selections of allotments in the year 1923 by the Indian Agent, and the writing that showed this stated that they were duly enrolled Quinaielt Indians. (Plaintiff's Exhibit Nos. 4, 7 and R. 408).

In Case No. 142 *Rich Halbert v. United States*, the father of petitioner is a duly enrolled and allotted Indian of the Quinaielt Reservation (R. 398). The father and son now live on the border of the reservation on Lake Quinaielt (R. 398). The

father was an Indian policeman (402), the Indian Agent putting him in charge of issuing fishing licenses to white sportsmen who fish on the reservation, and to save the lake for the Indians (R. 399, 400). The father had a fishing location on the Quinaielt River issued by the Agent (R. 398). Petitioner was carried on Quinaielt Census Roll for many years and dropped in year 1919 for unknown reasons (R. 409). The Indian Agent in 1923 allowed petitioner a selection on the Quinaielt Reservation certifying that he was a duly enrolled Quinaielt Indian (Plaintiff's exhibit No. 2).

All these petitioners are looked upon and considered as Indians by white people and Indians alike (R. 338, 412, 414).

Petitioners had an aunt, Phoebe Alexander, allotted on the Quinaielt Reservation (R. 403, 416, 475); also an uncle, Ethan Allen Halbert (R. 3, 9, 28, 40, 45).

All of the petitioners in the four above entitled cases, their parents and relatives, throughout all their lives have associated with the Indians in the locality of the Quinaielt Reservation and are Indians (R. 339, 381 to 434).

The mode of living of the Halbert families has not changed a particle since the allotment of their parents. One of the Halberts was denied

admission as a member of a lodge because he was an Indian (R. 388).

There is an Upper Chehalis tribal roll kept from 1906 to 1927. None of the Halberts appear on this roll (R. 593) but they do appear on Quinaielt tribal roll (R. 2, 9, 21, 27, 39, 45, 57, 63, 398, 403, 405, 408, 409).

In these cases it is to be noted that there never has been an abandonment of the habitat of the ancestors as in the case of *Oakes et al v. United States*, 172 Fed. 305, but these petitioners and their family lived in or about Hoquiam, originally an Indian villiage, down to and including the present time. It is true that white people have moved in and about them, and they have mixed and intermarried to some extent, but they have always maintained their homes and identity as Indians of this locality.

We contend that the Interior Department itself has placed the indelible stamp of Quinaielt Indians upon this family and that the Department cannot now erase it. Respondent attempts to show that these petitioners, while Indians, are of the Upper Chehalis Tribe. The records of the Department and the trial record completely negatives this idea. Indian Agent Sams in the year 1923, two years before this litigation started, described petioners as

"duly enrolled members of the Quinaielt tribe of Indians." (Plaintiff's exhibits 2, 4, 7 and R. 408).

The Secretary of the Interior on September 24, 1910, speaking of another Indian said:

> "These applicants are mixed blood who belong to that band of the Quinaielt tribe which resides in the vicinity of Grays Harbor on the Chehalis River, Washington." (Plaintiff's exhibit No. 15).

That in the early 80's Colonel Wood was the Agent for the Quinaielt Reservation and at that time he enrolled the Indians living at Hoquiam (R. 393).

H. H. Johnson, who was Superintendent of the Quinaielt Reservation from 1908 to 1913, during the first allotments on this reservation, and who spent seventeen years in the Indian Service, testified:

> "That in case of an Indian, who is enrolled and allotted but is married to a white woman and living off the reservation, at Hoquiam or Bay Center, a child born under these conditions to this couple, the practice would be to enroll such child with the father and certify the child for allotment. The child would be enrolled with the father." (R. 493-497).

CASE 147

The petitioners in case No. 147, Mary Barichio Petit, Norris A. Petit and Ellis A. Petit, have an Indian father and an Indian mother. The father of Mary Barichio Petit is Frank Barichio, an enrolled and allotted Quinaielt Indian, and her mother, Leda Givens, is a woman of part Indian blood. The petitioners, Norris A. Petit and Ellis A. Petit, are children of this Indian women and Paul Petit, a recognized allotted Quinaielt.

CASE 148

In case No. 148 the petitioner, Oscar Brignone, is a grandson of Ellen Amelia Springer, Quinaielt Allottee No. 595. His father was Joe Brignone who formerly resided upon and fished upon the Quinaielt Indian Reservation (R. 572). The petitioner Dewey Barichio is a full brother of Mary Barichio and a son of Frank Barichio. Vinie Wilson, the wife of Dewey Barichio and the mother of petitioners, Romie, D., Leda E. and Andrew B. Barichio, is duly enrolled and allotted on the Quinaielt Indian Reservation (R. 550 to 553, 569 to 573). The Barichio and Petit families live on Shoalwater Bay, Washington, with a colony of mixed Quinaielts and Lower Chehalis there residing, virtually all of whom except petitioners were allotted on the Quinaielt Indian Reservation prior to 1908 (R. 493 to 495, and 498). These families

FAMILY TREE OF BARICHIO AND PETIT FAMILIES

Ah-ba-loh or **Elizabeth Springer**
Full blood from Shoalwater Bay
Quinaielt Allottee No 592.
She had seven children as follows:

1. **Frank Barichio**
   Quinaielt Allottee No. 593
   Married to **Leda Sturna**
   Part Indian
   - 1. **Dewey Barichio**
     Petitioner in Case No. 148
     Married to **Vinie Wilson**
     Quinaielt Allottee
     - 1. **Leda E. Barichio**
     - 2. **Remy O. Barichio**
     - 3. **Andrew B. Barichio**
       Three Petitioners in Case 148.
   - 2. **Mary Barichio Petit**
     Petitioner in Case No. 147
     Married to **Paul Petit**
     Allotted on Quinaielt Res.
     Note: Both the Mother and Father of Paul Petit were Quinaielt Indian Allottees (Good)
     - 1. **Norris A Petit**
       Petitioner
     - 2. **Ellis A Petit**
       Two Petitioners in Case 147.
2. **John Barichio**
   Quinaielt Allottee No 590.
3. **Lena Calhoun**
   Quinaielt Allottee
   Married to **Wm. Calhoun**
   Quinaielt Allottee
   - They had four children, all allotted on Quinaielt Res.
4. **Ellen Amelia Springer**
   Quinaielt Allottee No. 595.
   Married to **Paul Brignone** (White Man)
   - 1. **Joseph Brignone**
     Died without allotment
     Married to a white woman
     - **Oscar Brignone**
       Petitioner in Case. 147
   - 2, 3, 4, 5. Four children All 4 allotted on Quinaielt Res.
   - 6. **John Brignone**
     Allotted (?)
5. **Tenino Pellard**
   Died before Allotment.
6. **Emma Pellard**
   Died before Allotment
7. **Mary Franklin**
   died before Allotment
   - Had one son **Henry Franklin**
     Quinaielt Allottee No. 596.

are of mixed Quinaielt and Lower Chehalis blood (R. 553), and under the stipulation (R. 421) should be allotted. The Barichio and Petit families are and always have been fishermen and oystermen at Shoalwater Bay, on the Quinaielt River or on the Columbia River (R. 572).

Case 146

Case No. 146 is largely the sequel of two cases, unappealed, tried in the District Court for the Western District of Washington, Southern Division, being No. 324 and No. 325 in said Court, wherein the mother and father of these petitioners were allotted on the Quinaielt Reservation (R. 227 to 228). The father of these petitioners is a fisherman and always has been one. He was allotted by decree of the Federal Court along with a number of his near relatives (R. 130, 137, 485, 490).

What has been said in reference to case 146 applies also to case 149, excepting that in case 149 the petitioners are the children of an Indian father and a white mother; that the father of these petitioners was for many years a fisherman along the Columbia River with the other Quinaielt Indians (R. 514, 516).

Case 151

Case No. 151 is also based to some extent upon cases 324 and 325 in the District Court, wherein the mother of these petitioners was allotted. This

family has always lived where they now live, with a group of Quinaielt Indians living on the Columbia, and being fishermen (R. 267, 273, 342, 490 to 491). The petitioners in this case clearly come within the saving clause of the Act of June 7, 1897, as they are children of a marriage between their Indian mother, Louise E. Henry, and a white man contracted in 1890 (R. 491), seven years prior to the passage of the Act of 1897.

CASE 152

In case No. 152 the petitioners are the children of a full blood Indian woman, who is part Quinaielt and part Lower Chehalis, and a white man, John Walkowsky, being a marriage which was contracted January 9, 1893, more than four years before the passage of the Act of June 7, 1897. The mother of these petitioners and eight of their brothers and sisters are duly enrolled and allotted upon the Quinaielt Reservation (R. 521, 522). These petitioners live with their mother at Shoalwater Bay, Washington, among that colony of mixed Quinaielt and Lower Chehalis Indians heretofore referred to (R. 498, 521, 542).) Under the stipulation, at page 421 of the record, they are entitled to be allotted. They clearly come within the saving clause of the Act of June 7, 1897, as interpreted by *Oakes et al v. United States*, 172 Fed. 303. There was an unnecessary adoption proceed-

ing conducted whereby the mother of these petitioners and the eight allotted children were adopted into the Quinaielt tribe and this adoption was approved by the Secretary of the Interior. These petitioners were not living at the time of said adoption but have been born since. As we have already pointed out, under the rules of the Department set out in the case of *Mounts et al v. the United States*, printed in the Appendix, being No. 385 Equity, Western District of Washington, Southern Division, they are entitled to allotment. The attempt of the respondent to rule these petitioners out of rights on the Quinaielt Reservation, because their mother and living brothers and sisters were needlessly adopted, is a great injustice to three petitioners who are entitled to allotment on the Quinaielt Reservation if any Indians are entitled to be allotted there. But for this unnecessary proceeding, no question could be raised but that these children came under the saving clause of the Act of June 7, 1897. The mother of these petitioners was married the second time and an offspring of this marriage sued for allotment but the trial court held this child not to be entitled to allotment because the marriage of which this child was the issue occurred subsequent to the passage of the Act of 1897, showing that the court carefully considered all these cases on their merits.

CASE 153

In case No. 153, the District Court and the Circuit Court of Appeals allotted the mother of petitioner Lizzie Rolfson because she was a Lower Chehalis Indian. The District Court allotted the petitioners, Eugene and Alvin Smith, but the Circuit Court reversed this ruling. These petitioners, Eugene and Alvin Smith, were born of a marriage between Lizzie Rolfson, a Lower Chehalis Indian, and a white man, which was solemnized in the year 1887, ten years before the passage of the Act of June 7, 1897. They come within the saving clause of the Act of June 7, 1897, as interpreted by *Oakes et al v. The United States*, 172 Fed. 303. They were born and lived most of their lives at Hoquiam, Washington, a former Indian community, where the mother now resides (R. 391 to 393, 472 to 476). In this case the trial court denied an allotment to a child of Mrs. Rolfson, born of a marriage solemnized subsequent to June 7, 1897.

CASE 145

In case No. 145, petitioners are the children of an Indian father, Henry Peers, a Lower Chehalis Indian (R. 519), and an Indian mother, Judith Ducheney (R. 93, 98, 99), a Quinaielt Indian, a sister of Agnes Elliott allotted on the Quinaielt Indian Reservation. Judith Ducheney, the mother, died without receiving an allotment. These pe-

FAMILY TREE Case 145.

Ellen Pellard

Full blood Indian Woman of the Shoalwater Bay locality. Had three children. She died in 1900.

Married to a man, part Indian, part French-Canadian

- **Adelin Lehre** (deceased)
  Quinaiolt Allottee No. 529
  - 1. Sophia Millett Yerkes
  - 2. Ellen Baker { Married to a white man and their son Harry David Baker is allotted on Quinaiolt Res.
  - 3. Daisy Borg
  - 4. Cora Walter John
  - 5. Francis James Payne
  - 6. Eleain James Chenois
  - 7. Maud James Ross

  All seven allotted on Quinaiolt Reservation.
- **Archie Pellard**
  Conditionally allotted by Circuit Court of Appeals (R645)
- **Henry Peers** (deceased)
  Father
  Married to
  - 1. Mable Peers White
    Petitioner in Case 145
  - 2. Amelia Peers Alden
    Petitioner in Case 145
  - 3. Rose Peers Pickernell
    Petitioner in Case 145
    Married to Nathan Pickernell, Allotted on Quinaiolt Reservation

Mary Rondeau Ducheney

[illegible] Quinaiolt & Quinoak

Married to

Roque Ducheney.

Half Indian, half French Canadian.

They had two children

- **Julia or Judith Ducheney**
  (deceased) Mother.
- **Agnes Elliott**
  Allotted by decree of Dist. Court West. Dist. of Wash. South. Div. Case 272 E.

titioners clearly come within the terms and conditions of the stipulation (R. 421) to the effect that Lower Chehalis are entitled to allotment on the Quinaielt Reservation. An additional fact in this case is that the husband of Rose Peers Pikernoll, a petitioner herein, is an allotted Quinaielt Indian (R. 520).

CASE 154

Mary Francis Provoe, Laura M. Brown, Frank M. Provoe, et al., petitioners, claim that they are of the Upper Chehalis tribe. We are including herein a family tree of the Provoe family which will show the ancestry far beter than we could explain it. This chart, as well as the other charts herein, is fully borne out by the record in these cases.

Mary Francis Provoe, petitioner, is probably, strictly speaking, a Chehalis Indian. She was married to David Provoe, a Cowlitz Indian. The children are therefore mixed Cowlitz and Chehalis. Mary Francis Provoe and a number of her children live on the little Chehalis Reservation near Oakville. Sarah Spencer, petitioner, a daughter of Mary Francis Provoe, lives at Moclips, just outside the Quinaielt Reservation (R. 597). All the petitioners were recognized by the Quinaielt Indians in the 1912 meeting as being Indians entitled to allotment (R. 587). Their names were upon

the roll until 1918 when they were dropped without notice.

These petitioners do not live on the very immediate coast of Washington. However, the Chehalis Indians at the time of the treaty and Executive Order were fish-eating Indians. The record shows that all of the Indians of Southwestern Washington were and are closely affiliated with the Quinaielts. These petitioners clearly come within the classification of tribes held entitled to allotment by the Solicitor for the Interior Department. On pages 324 and 325 of the record he states:

> "The more reasonable view is that only the Indians of the tribes or bands on the immediate coast of Washington and those affiliated therewith were contemplated."

The Provoes, furthermore, come within Superintendent H. H. Johnson's definition of fish-eating Indians of the Pacific Coast. Except Mary Francis Provoe, the petitioners are Indians on both sides of the family.

The Circuit Court of Appeals criticises the Provoes for applying for allotments as Quinaielt Indians inasmuch as David Provoe, the father, was a Cowlitz Indian, and Mary Francis Provoe, the mother, and petitioner, probably an Upper Chehalis. This criticism was entirely unwarranted. Petitioners had been recognized by the Quinaielt In-

FAMILY TREE
OF THE
PROVOE FAMILY Case No. 154

Mals-Kam-Kung
Black River Tribe
Upper Chehalis
Married to
Huck-Ki-seali
Upper Chehalis Tribe.
They had three children.

1. Sally
Full blood Indian woman of Black River or Chehalis tribe
Married to
John Kindred
a White man.
They had three children.

2. Lizzie or Kli-tum
had a daughter Anne

3. Maria or Mrs Kam-heal
Had a daughter

1. Mary Frances Provoe
Petitioner in Case 154
Married to
David Provoe
A Cowlitz Indian
They had eight children:

1. John W. Provoe - deceased
2. Laura M. Brown
3. Frank M. Provoe
4. Rosa M. Garrard
5. Sarah Spencer
6. Isabelle Rainey
7. William Provoe
8. Raymond Provoe

} Petitioners in Case No. 154.

2. Lafayette Kindred
Had three children:
Note: See Plaintiffs Exhibit "B" for Status of this man, being Case No. 12 Secretary's letter of September 24, 1910.

1. Ida May Gill
2. Katie Thomas
3. Fannie De Lamater

All three children allotted on Quinaielt Reservation

3. Nancy

Mrs Sampson Johns - Quinaielt Allottee
wife of Sampson Johns. Quinaielt Allottee

dians in 1912. The Department itself had referred to Lafayette Kindred, the brother of Mary Francis Provoe, as a Quinaielt Indian.

Plaintiff's Exhibit 15 contains a letter addressed to the Secretary of the Interior and signed by F. H. Abbott, Assistant Commissioner of Indian Affairs, dated September 24, 1910, approved by Frank Pierce, First Assistant Secretary of the Interior, file marks L5921, page 9, as follows:

> "Lafayette Kindred for his four children and one grandchild, Albert L., 16 years, Fannie J., 13, and Kate J. Kindred, 11, and Ida May Gill, 25, and her child Adaline May Gill, 11 months old.
>
> "*The applicant is a mixed blood Quinaielt Indian* and has resided near the reservation and has been associated and identified with the tribe for some years. He expresses the intention of making the reservation his permanent home." (Italics ours).

These petitioners are entitled to allotment under the Executive Order of November 4, 1873, and also under the Act of March 4, 1911.

VI.

CONCLUSION

There are but a few questions involved in these cases. The first and most important one is wheth-

er or not residence upon the Quinaielt Reservation or on one of the small executive order reservations is a prerequisite for allotment on the Quinaielt Reservation. This question is referred to in a number of places throughout the argument. The long established policy of the Department in granting allotments to non-reservation Indians and in telling the Indians that it would not be necessary for them to reside on the reservation in order to be allotted (R. 494, 495); the fact that many of the Indians of Southwestern Washington still make their living by fishing as they have since the earliest times—combined with the fact that the reservation set aside for them was not habitable until cleared—make the ruling of the Circuit Court of Appeals, on the question of residence, unreasonable and inequitable, and not in accord with the authorities.

The second question is: What tribes were (or are) affiliated with the Quinaielts and the Quileutes in the Treaty of July 1, 1855, and January 25, 1856, within the meaning of the Act of March 4, 1911? (Appendix F). This is important for the reason that, though many of the petitioners are descendants of Quinaielt Indians, others are mixed Quinaielt and Chehalis, Quinaielt and Chinook, Chehalis and Cowlitz, etc. They claim rights on the reservation, not only under the Executive Order of 1873 (Appendix C), but also under the Act

of March 4, 1911 (Appendix F). The trial court held that the Chehalis (Upper and Lower), the Chinook and Cowlitz tribes, which were present at the Cosmopolis negotiations in 1855, were the tribes affiliated with the Quinaielts and Quileutes in the treaty. As we have pointed out, this is the only possible construction that will reconcile the Acts and Executive Order of 1873—the long established policy of the Department and the early history of these remnant tribes. It is equitable, and in keeping with "the genius of our institutions," in that it in some measure recompenses the Indians of Southwestern Washington for the vast territory taken from them.

The final question is: Must the children of enrolled and allotted members of the Quinaielt tribe, or members of the tribes or bands for whom the reservation was set aside, be adopted into the Quinaielt tribe before they can be allotted? The very statement of the question would seem to answer it. The Department has heretofore never required the fish-eating Indians for whom the reservation was set aside and who, we thoroughly believe, were further provided for by the Act of March 4, 1911 (Appendix F), to be adopted into the Quinaielt tribe. The view that the children of enrolled and allotted Indians—who still continue to live in the ancient habitat of their tribes and bands—must be adopted is, as we have shown, not

only contrary to all previously held conceptions but it is also contrary to the rules and regulations of the Department itself.

It is not our intention to condemn or unnecessarily to criticise the Department of the Interior for refusing allotments to petitioners after having allotted several hundred other Indians in exactly the same situation. As we have said, the task of allotting this reservation has not been an easy one. In the first place, the Quinaielt Reservation is a large one. The Indians for whom it was intended are scattered over an extensive area. It would be impossible for an allotting agent to know personally all the Indians. There have been numerous groups to please. Some have felt that, in spite of the decision in the case of *Tommy Payne v. United States*, 264 U. S. 446, 284 Fed. 827, the reservation should not be allotted—or, at least, allotted as little as possible. The small group of Quinaielts who fish commercially in the Quinaielt River and who are able to live on the reservation have fostered this view. As we have said, they believe that much land will be left over after the allottment work is completed. This will be tribal property. When it is sold the money will be paid into a tribal fund and in the distribution of this fund the reservation group may be expected to receive the lion's share.

The Quinaielt Reservation is a long way from Washington, D. C. For its knowledge of the sit-

uation and for its knowledge likewise of the individual applicants, the Department has had to rely on information furnished by local agents, among whom constant changes were being made. In not all instances has this information been accurate. It is not strange that the Department's knowledge of the claims of petitioners was not as accurate as it might have been. It was for just such situations as this that Congress passed the Act of August 15, 1894 (28 Stat. L. 305).

It has been suggested that some of the petitioners, while not leaving their tribal habitat, have locally assumed the ways of the whites and, for that reason, have no equitable rights on the Quinaielt Reservation. An examination of the record will show that this contention was raised in the lower court in regard only to one or two groups of petitioners. Unfortunately, before the Circuit Court of Appeals, the impression was given that nearly all were subject to this criticism (if criticism it can be called). It is sometimes quite difficult to define an equitable right. The petitioners are the descendants of the remnant bands for whom the reservation was set aside. Their descent, their degree of blood and their mode of living differ in no way from those of several hundred other Indians who have already been allotted. The reservation is now being allotted. We know of no Indians who have greater rights, legal or equitable, to share in

this land-distribution than the petitioners in these suits.

We cannot better close this brief than by repeating the concluding paragraphs from our petition for writs of certiorari:

The petitioners are Indians and it is difficult for them to understand, or for counsel to explain to them, the ruling of the court which denies them allotments upon the Quinaielt Indian Reservation when they know that a large number of their neighbors and relatives, in exactly the same situation, have, without adoption and without prior residence on any reservation, been allotted upon the same reservation. The policy adopted and pursued by the Department has been that of allotting the Quinaielt Reservation, without the necessity of prior residence and without the necessity of adoption into the Quinaielt tribe, to the fish-eating Indians of Southwestern Washington, who are affiliated with the Quinaielts and Quillehutes in the Treaty of 1855 and 1856, in compliance with the Special Allotment Act of March 4, 1911, following the Solicitor's opinion and of allotting Quinaielt Indians who did not live upon a reservation. This course of dealing has placed a construction upon the Executive Order of November 4, 1873, and the Special Allotment Act of March 4, 1911, which these simple, unlearned fishermen should be permitted to rely upon, for

this court has frequently held that Indian laws and treaties should be construed, not according to the technical meaning of their words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Jones v. Meehan*, 175 U. S. 1. *United States v. Winans*, 198 U. S. 381.

We believe that the District Court, in dealing with the Quinaielt Indian Reservation and with the rights of petitioners to allotments on such reservation, was justified in following the opinion of the Solicitor for the Department of the Interior which that Department has consistently followed since 1916 and under which it has allotted upon the same reservation, since that time, seven-hundred to eight-hundred Indians, whose qualifications to receive allotments are exactly the same as are those of petitioners in these actions. We further believe that the construction placed by the District Court upon the Executive Order of November 4, 1873, and upon the Act of March 4, 1911, is the only one consistently sustainable with the previous and present policy of the Department of the Interior in dealing with this reservation. The District Court's interpretation of the meaning of the word "treaty" is the one which has been adopted and followed in the past by the officers of the Department of the Interior and it should not be abandoned now to the prejudice of these particular pe-

titioners. Although we realize the difficulties faced by the Department in this locality, we earnestly believe that the change of policy now sought to be imposed by the Department falls far short of of that essential good faith on the part of the United States, which is required in dealing with a class of people who have been more or less considered as wards of the Government and who, at least, so far as these rights are concerned, sustain that relationship now.

The decisions of the Circuit Court of Appeals are narrow and technical in the extreme. They are not in accord with the facts in the record. We respectfully urge that the judgments of the Circuit Court of Appeals be reversed and those of the District Court be affirmed.

OVERTON G. ELLIS,
A Member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington

STUART H. ELLIOTT
H. G. ROWLAND
DIX H. ROWLAND
Counsel for Petitioners,
Tacoma, Washington

APPENDIX

A—TREATY WITH THE QUINAIELTS, ETC., 1855-1856:

"Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

"Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are will-

ing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable * * *"

(Indian Affairs Laws and Treaties, Kappler, Vol. 2, page 719, 12 Stat. 971).

B—ACT OF MARCH 3, 1871:

"No Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

(16 Stat. 566, R. S. 2079.)

C—THE EXECUTIVE ORDER OF NOVEMBER 4, 1873:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians"—"and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory"—"be withdrawn from sale and set apart

for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast."

(Kappler, Ind. Laws & Treaties, Vol 1 (2nd Ed.), pp. 923-924.)

D—ACT OF FEBRUARY 8, 1887 (GENERAL ALLOTMENT ACT):

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they made reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provision of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the

rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

(24 Stat. 388) (25 U. S. C. A. 331).

E—ACT OF JUNE 7, 1897:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right."

(30 Stat. 90.) (25 U. S. C. A. 184).

F—ACT OF MARCH 4, 1911:

"That the Secretary of the Interior be, and is hereby authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians

in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-fifth, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes;

Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

(36 Stat. 1345).

G—ACT OF JUNE 2, 1924:

"All Indians born within the territorial limits of the United States are declared to be citizens of the United States. The granting of citizenship to Indians shall not in any manner affect the right of any Indian to tribal or other property."

(c. 233, 43 Stat. 253).

H—SECTION 324 OF THE ALLOTMENT REGULATIONS 1904 OF THE INTERIOR DEPARTMENT:

"Under Section 324 of the Regulations, 1904, and amendments thereto, children born to properly enrolled members of the tribe are entitled to enrollment with their parent or parents. This includes cases where the mother is an Indian

woman married on or prior to June 7, 1897, to a white man and living apart from the tribe, and the mother was recognized by the tribe as belonging thereto by blood, or was so recognized at the time of her death. It is not essential to enrollment that the children be so recognized nor that they be born on the reservation or among the Indians."

Act of June 7, 1897 (30 Stat. 90); and Solicitor's opinion of June 16, 1924, in the case of *Addie Prickett et al* (50 L. D., 554).

I—LETTER FROM THE COMMISSIONER OF INDIAN AFFAIRS UNDER DATE OF JANUARY 19, 1914:

"M. Peter E. Jackson,

"Port Gamble, Wash.

"

"As delegates of the tribes, these two Indians were further advised that under the general allotment act we are confined to a given number of acres of agricultural or grazing lands, and that such law did not contemplate the allotment of lands chiefly valuable for timber purposes; that timber valuable for commercial purposes was regarded as a tribal asset, to be administered for the benefit of the tribe at large rather than given to individual Indians by an allotment of land in severalty. It was

stated, further, that the office hoped to market this timber at a satisfactory price, and, when the timber had been removed, to allot the lands to Indians then found entitled, according to their character and value for agricultural and grazing purposes.

"Inadequate transportation facilities within and adjacent to the Quinaielt Reservation renders it difficult to find a ready and satisfactory market for the valuable timber there, and until these conditions are improved, or until the price of lumber per thousand feet increases materially, it is doubtful whether it would be wise to dispose of this timber in the immediate future. If by holding on for two or three years longer the price per thousand feet can be doubled, it will augment greatly the income of the Indians from this tribal asset.

"Allotments have heretofore been made to some 690 Indians within the Quinaielt Reservation, covering, in the aggregate, some 54,989 acres. A special allotting agent was on this reservation with a view of continuing the work there, but owing to the number of Indians entitled, and the fact that practically all the agricultural and grazing lands had theretofore been allotted, it became necessary to suspend

field operations until the timber on the tribal lands can be disposed of.

" . . . . . .

"(Signed) E. B. MERITT,
"Assistant Commissioner."

J—OPINION OF HONORABLE JAMES M. DIXON, FIRST ASSISTANT SECRETARY OF THE INTERIOR, IN CASE OF FRANCIS C. MOUNTS, ET AL, V. THE UNITED STATES (No. 385 EQUITY, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION):

Address Reply to
"The Attorney General
and refer to Initials and Number:
SWR-M
90-2-11-143 A. L.

RECEIVED
Office of U. S. Attorney
Nov. 6, 1929.
Seattle, Wash.
Ref. to PCR:FEB

DEPARTMENT OF JUSTICE

Washington, D. C.
November 1, 1929.

Anthony Savage, Esq.,
United States Attorney,
Seattle, Washington.

Re: FRANCIS C. MOUNTS ET AL, v. UNITED STATES, No. 385 Equity.

Sir:

There is transmitted herewith copy of a letter dated October 21, 1929, from the First Assistant Secretary of the Interior, relative to the above-entitled matter, which letter is self-explanatory.

As you will observe, the Interior Department has arrived at the conclusion that the plaintiffs in this case are entitled to enrollment and allotment upon the Quinaielt Indian Reservation. In view of this, it is suggested that you proceed no further in the defense of this case, and close the matter in your file.

Respectfully,

For the Attorney General,

(Signed) SETH W. RICHARDSON
Seth W. Richardson
Assistant Attorney General.

Enc. 59257

RECEIVED
Office of U. S. Attorney
Nov. 8, 1929,
Tacoma, Wash.
Ref. to .....

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Oct. 21, 1929

The Honorable
The Attorney General.

My dear Mr. Attorney General:

Further reference is made to your letter of June 21, 1929, transmitting for a report a photostatic copy of the bill of complaint in the case of *Francis C. Mounts et al v. the United States*, No. 90-2-11-743, in the United States District Court for the Western District of Washington, Southern Division.

On page 2 of the report to your Department it was stated that further facts would be obtained from the agency relative to the rights of the plaintiffs in this suit, and if it is found that they are entitled to the rights sought a recommendation would be made that the United States District Attorney be authorized to end the suit by stipulation.

Investigation of this matter develops the fact that Frank Mounts, the father of the plaintiffs, was enrolled by adoption and his enrollment was approved August 30, 1909. The oldest of the plaintiffs is 19 years of age. It is clear, therefore, that all the plaintiffs were born after the

adoption of their father into the Quinaielt Tribe of Indians. *It further appears that these people have never resided upon the Quinaielt Reservation.* However, it further appears that the father has never abandoned his tribal affiliation as he has always taken an active part in tribal affairs and often, though his residence is away from the tribe and his wife is a white woman, he has held tribal office and is now Vice President of the Quinaielt tribal council.

In view of the fact that the father of these children does not appear to have abandoned his tribal relations as shown by his position as a tribal officer, these children are entitled to enrollment and allotment on the Quinaielt Indian Reservation. It is therefore recommended that the proper United States District Attorney be instructed to take appropriate action to end the litigation already commenced in this case.

Had an application been properly made on behalf of these children and forwarded to this Department with a statement of all the above facts there would have been no necessity for the institution of a suit in this case.

A copy of this letter is being transmitted to

the Superintendent Taholah Indian Agency as instructions to enroll and allot these plaintiffs.

Very truly yours,

(Signed) JAS. M. DIXON,

First Assistant Secretary

Filed in the United States
District Court, Western District
of Washington, Southern Division,
November 26, 1929.
Ed M. Lakin, Clerk
By E. Redmayne, Deputy.

FILE COPY

Office Supreme Court, U.
FILED
MAR 17 1931
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

Nos. 141-154

HILARY HALBERT, JR., ET AL., PETITIONERS,

vs.

UNITED STATES.

PETITIONERS' REPLY BRIEF.

WEBSTER BALLINGER,
OVERTON G. ELLIS,
STUART H. ELLIOTT,
H. G. ROWLAND,
DIX H. ROWLAND,
Attorneys for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

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HILARY HALBERT, JR., ET AL., PETITIONERS,

vs.

UNITED STATES.

PETITIONERS' REPLY BRIEF.

Respondent's brief raises questions here conceded in one or both of the courts below. These and other questions raised, while harmless when properly understood, require explanation. Hence this reply.

Counsel for respondent (Brf., pp. 4-5) here present six questions for decision which will be considered in the order stated:

First Question.

"Whether members of the Chehalis, Chinooks and Cowlitz tribes of Indians are entitled to allotments upon the Quinaielt Reservation?"

In the trial court (R., 421) counsel stipulated "that the Lower Chehalis tribe of Indians are entitled to allotments on the Quinaielt Reservation". In the appellate court below, counsel made similar concession (R., 667), while counsel here submit the question as to the rights of the Chehalis, as well as the Chinook and Cowlitz tribes to the court (Brf., p. 21). This submission is followed by an argument (Brf., pp. 21-5) designed to exclude the members of all three tribes from allotments.

The rights of the Chehalis, Chinook and Cowlitz Indians to allotments on the Quinaielt Reservation are dependent upon (1) the proper construction of the Executive Order of 1873 (R., 299-300) and (2) the Act of March 4, 1911 (R., 300-301).

By the Quinaielt-Quillehute Treaty of 1855-6 (Resp. Brf., Appx. A), hereinafter referred to as "the Treaty", it was agreed, by Article 2, that a tract or tracts of land "sufficient for their wants" should be selected by the President, surveyed, located and set apart "for their exclusive use", and, by Article 6, defendant agreed to expend the sum of $2,500.00 for their removal and settlement on the reserve. Nothing was done toward the establishment of a reservation under the treaty until 1863, when a tract of land comprising about 10,000 acres around the mouth of the Quinaielt River was surveyed (R., 436, 442). This tract was never specifically set aside by Executive Order (R., 311), nor was any appropriation ever made for the removal of the Indians. By Article 6 (Resp. Brf., Appx. A., p. 3) the President was authorized, in his

discretion, to remove the Indians from the reservation, for which provision had been made by Article 2, and to locate them upon another and different reservation and to there consolidate them with other tribes.

Nothing having been done, the Superintendent of Indian Affairs for Washington Territory, in 1865 (R., 297-9, 469) recommended to the then Secretary that the reservation surveyed for the Quinaielt and Quillehute Indians, and embracing 10,000 acres of land, be enlarged so as to include approximately 224,000 acres for the use of not only the Quinaielts and Quillehutes, parties to the treaty, but also for the use of the "*remnants of the Chehalis, Humptulups, Shoalwater Bay and Chinook tribes*", which he stated "are emphatically fish eaters and draw their subsistence almost wholly from the water and therefore have but little taste or desire for agricultural or land production." Attention is invited to that portion of the report upon which the Order was based appearing in the record (R., 297-9). Attention is further invited to the fact that the remnant Cowlitz tribe, which is not specifically named in the Superintendent's report (R., 297-8), had, at the time of the Executive Order of 1873, been merged with the Chehalis tribe, the Cowlitz Indians in 1885 being no longer known by that name (Bu. Am. Ethn., Bul. 30, Pt. 1, p. 355).

Acting upon said report, the President, on November 4, 1873, issued an Executive Order (R., 299-300) as follows:

> "In accordance with the provisions of the treaty with the Quinaielt and Quillehute In-

> dians" * * * "and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory" * * * "be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and *other tribes of fish-eating Indians on the Pacific Coast.*"

Counsel for respondent (Brf., p. 25) contend:

> "The broad language in the Executive Order, 'other tribes of fish-eating Indians on the Pacific Coast', might well be construed to include only such other tribes as were in the immediate locality, under the principle of *ejusdem generis*, particularly since the Order itself uses the phrase, 'other Indians *in that locality*'."

Counsel for petitioners submit that such a construction would limit benefits on the reservation to the Quinaielts, whose rights were secured by the treaty, as the Quinaielts claimed the possessory title to the land immediately surrounding the reservation, as will appear from the map accompanying the brief of counsel for respondent, and would thus render meaningless the words "other Indians", as there was no *other* Indians who held possessory title to any of the land immediately surrounding the reservation. Such a construction would also render meaningless the words appearing in the last portion of the Executive Order, "and other tribes of fish-eating Indians on the Pacific Coast". The word "on" was here used in its enlarged, not restricted sense, as none of the Indian settlements were located immediately on the "Pacific

Coast'' but were located on the rivers and streams flowing into the Pacific Ocean, the harbors and lakes as they are today.

That petitioners come within both designations "other Indians in that locality'' and "other tribes of fish-eating Indians on the Pacific Coast'' appears plain from respondent's brief, pages 12 and 13.

Nowhere in the record, nor in the briefs now before the Court, does the legislative history of the Act of March 4, 1911, appear. While the official documents shed but little light on the intent of Congress, they do shed some light upon its evident purpose. Counsel for petitioners feel justified, even at this late day, in fairness to the Court, in bringing to its attention the legislative history of this Act.

Senate Bill 5269 (R., 641-3), which later became the Act of March 4, 1911, was introduced in the Senate January 13, 1910 (Cong. Rec., Vol. 45, Pt. 1, p. 577), and provided as follows:

> "That the Secretary of the Interior be, and he is hereby, authorized and directed to allot on the Quinaiult Reservation, Wash., under the provisions of the allotment laws of the United States, all members of the Hoh, Quileute, and Ozette tribes of Indians in Washington who may elect to take allotments on the Quinaiult Reservation rather than on the reservations set aside for these tribes: *Provided*, that the allotments authorized herein shall be made from the surplus lands on the Quinaiult Reservation after the allotments to the Indians thereon have been completed.''

Upon this bill the Department, under date of February 18, 1910, submitted a report (R., 641-3). The Senate Committee on March 1, 1910, reported S. 5269 without amendment, Report No. 300 (Cong. Rec., Vol. 45, pt. 3, p. 2540). The report contains five lines and offers no explanation of the bill other than that contained in the Departmental report of February 8, 1910, which was printed as an appendix. March 9, 1910, S. 5269 was passed by the Senate without amendment and without discussion (Cong. Rec., Vol. 45, pt. 3, p. 2951). The bill then went to the House Committee. On February 11, 1911, the House Committee reported the bill to the House without amendment, accompanied by a report, No. 2152 (Cong. Rec., Vol. 46, pt. 3, p. 2391). This report contains five lines, and offers no explanation of the bill, other than that appearing in the Departmental report which is printed as an appendix. March 2, 1911, the bill was considered in the House and amended to read as it appears in the Statute, except that the word "were" appears in the place of the word "are" before the word "affiliated" (Cong. Rec., Vol. 46, pt. 4, p. 3937). No explanation was offered on the floor of the House of any amendment. On the same day, to-wit, March 2, 1911, (Cong. Rec., Vol. 46, pt. 4, p. 3891,) the Senate concurred in the House amendments, there being no discussion nor explanation offered. Although the bill as it passed the House contained the word "were" before the word "affiliated", the Senate struck out the word "were" and inserted the word "are", which was evidently upon the assumption that the House had stricken out the word

"were" and inserted the word "are", as the Senate was concurring in the House amendments. It would therefore appear that the word "are" should be construed as "were", for only by such construction can it be given any meaning.

The amendments made to the bill in the House, and later concurred in by the Senate, were: after the word "Ozette" and before the word "tribes" appearing in the bill as originally introduced and as it passed the Senate, the words "or other" were inserted; and after the word "who" the following words were inserted:

> "are affiliated with the Quinaielt and Quillehute tribes in the treaty of July 1, 1855 and January 23, 1856 and who."

It would therefore appear that the clause

> "who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes"

was intended to relate to the Hoh, Quileute and Ozette tribes for whom the three little reservations had been set aside, and was not intended to have any relation to the

> "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quillehute tribes in the treaty of July 1, 1855 and January 23, 1856."

It would also appear that Congress, by the amendment inserting the words

> "other tribes of Indians * * * who are affiliated with the Quinailet and Quillehute tribes in the treaty."

intended to confer benefits upon those tribes for whom no reservations had been set aside, but who were embraced within the terms of the Executive Order. It would further appear that Congress by the amendment had in mind the treaty convention held at Cosmopolis in February, 1855, in which the Chehalis, Chinook and Cowlitz Indians participated (Pet. Brf., 17), which convention appears to have been the only conference held with any of the Indians prior to the actual signing of the treaty on July 1, 1855, on the Quinaielt River by the Quinaielts, and the actual signing of the treaty at Olympia by the Quillehutes on January 25, 1856. An examination of the certified copy of the draft of the treaty made at Cosmopolis (which is on file with the Court) will disclose that its text is substantially identical with the treaty as signed by the Quinaielts and Quillehutes, except as to the description of the land to be ceded, the signatory parties and dates. It would therefore appear that Congress in using words appearing in the Act of March 4, 1911, viz., "who were affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, 1856", had in mind the conference at Cosmopolis in which the Chehalis, Chinook and Cowlitz Indians participated.

While the trial court did not have before it the legislative history of the bill that became the Act of March 4, 1911, it reached the same conclusion (R., 331-7), to which the special attention of this Court is invited.

As so construed, every part of the Act is given force and effect, and, counsel submit, effectuates the evident intent and purpose of Congress, which was to provide allotments for all Indians for whose use the reservation was set aside by the Executive Order.

Following the Act of March 4, 1911, a question arose as to the right of the "Clallam, Cowlitz, Squaxion Island, Port Gamble, Hoh, Ozette, Quileute and other fish-eating Indians in the State of Washington" to allotments on the Quinaielt Reservation under the treaty, Executive Order, and Act of March 4, 1911. To clarify the situation a bill was introduced in the House directing allotments to said Indians. Under date of January 14, 1913, (R., 320-21; Resp. Brf., pp. 28-9,) the Indian Bureau advised:

> "In view of the treaties, executive orders, and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary."

Under date of September 2, 1916 (R., 295) the Solicitor for the Department, after a review of the entire situation (R., 324), affirmed the action of the Indian Bureau. Prior to the letter of the Indian Bureau a large number of Chehalis, Chinook and Cowlitz Indians had been allotted on the Quinaielt Reservation. Of the 1,414 Indians now allotted on that reservation more than half are Chehalis, Chinook and Cowlitz Indians, the Quinaielts and Quileutes having heretofore been all, or substantially all, allotted. There is no question as to available land to allot all "fish-eating Indians on

the Pacific Coast" as the reservation is susceptible of more than 800 additional allotments, and the allotment work is now reaching completion.

Second Question.

> "If so, whether the petitioners, or any of them, are Chehalis, Chinook or Cowlitz Indians."

This question is considered by counsel for respondent (Brf., pp. 29-38) with reference to pages 14 and 15.

The principal objection of counsel for respondent (Brf., 29) to the decrees of the trial court in cases No. 141 to 151, both inclusive, appears to be based on the quantum of petitioners' Indian blood. The quantum of Indian blood, except in cases arising under special laws, has never been determinative of a right to share in tribal property and has no application to any case now before the court. Apparently for this reason there is no direct testimony in the record in any of the cases of the quantum of Indian blood of any of petitioners or their ancestors, except in certain cases where their mothers or grandmothers or great-grandmothers were full bloods. There is evidence in the record showing the white ancestry of each of petitioners from which a deduction may be reached as to whether white or Indian blood predominates. For the information of the Court it may be stated that in cases numbered 145, 147 and 148 petitioners have approximately three-fourths or more Indian blood; in cases numbered 141, 142, 143 and 144 they possess one-eighth or more Indian blood, and in the remainder of the cases they are

approximately one-half Indian blood. All of which counsel for petitioners submit is immaterial, the basic rights to an allotment depending upon (1) membership in a tribe, or (2) rights of Indians and their children protected by remedial Acts. *U. S. vs. Wildcat*, 244 U. S. 111, at 119; *McDougal vs. McKay*, 237 U. S. 372, at 383; *Oakes vs. U. S.*, 172 Fed. 305.

Counsel complain that the Bills allege that plaintiffs are members of the "Quinaielt tribe", whereas the proof shows, and the trial court found, them to be Chehalis, Chinook and Cowlitz Indians. Since these defects may be cured by amendments, and nothing is to be gained by sending the case back for that purpose, this Court will consider the amendments made, and dispose of the cases (*Realty Holding Co. v. Donaldson*, 268 U. S. 398, at 500, and cases therein cited).

CASES NO. 141, 142, 143, 144, 145, 147, 148 AND 154.

Counsel then concede (Brf., pp. 29, 14, 15) that the District Court found petitioners in these cases (Brf., p. 14) to be members by blood of the Chehalis, Cowlitz or Chinook tribes. Counsel admit (Brf., p. 19) that no objection was made to the introduction of evidence upon which the finding was based and further admit (Brf., p. 30) that no error specifically challenging the findings of the trial court was assigned. The appellate court below, and counsel for respondents here, concede the facts as found by the trial court. It was, however, contended in the appellate court below, and for the first time, and the contention is renewed here by

counsel for respondent (Brf., p. 30), that in view of the fact that the opinion of the District Court set out the lineage of each person, it is permissible on the state of the record to contend that the facts as found by the trial court were not sufficient to support its findings that petitioners were members of said tribes.

The appellate court below, or this Court, may notice a plain and serious error of the trial court, appearing on the face of the record, but on the records before the appellate court below, and this Court here, no such error appears to have been committed to the injury of respondents. The error claimed by counsel for respondent is that the records show that the grandfathers, or great-grandfathers, of petitioners were white men who married Indian women members of the Chehalis, Chinook or Cowlitz tribes; that by law the children of such marriages took the status of their white fathers and were white people, citizens of the United States, and the status of petitioners, their issue, is that of white people, citizens of the United States, and not members of the Chehalis, Chinook and Cowlitz tribes. It may be conceded by counsel for petitioners that such is the general rule announced and followed by the courts, but to this general rule there is a well recognized exception, ignored by the appellate court below and by counsel for respondent here, which when applied to petitioners removes all basis for the claimed error relied upon by respondents. The Court will observe that nowhere in respondent's brief is the date of the marriage of the white man to the Indian woman stated (Brf., pp. 29-38). In every such in-

stance the marriage occurred prior to 1870, at which time, and apparently at all times prior to August 9, 1888, the Indian woman retained her status as a tribal Indian, particularly where she remained with her tribe; and, depending upon tribal laws and customs, the white man may or may not, by reason of his marriage to the Indian woman, have become a member of the Indian tribe of his wife. The first act designed and intended to put an end to the acquisition of tribal membership by white men marrying Indian women, and the first act that declared the status of an Indian woman marrying a white man to be that of a citizen of the United States, was the Act of August 9, 1888 (25 Stat. 392), which provided as follows:

> "That no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian tribe in the United States, or any of its Territories, except the five civilized tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.
>
> "That every Indian woman, member of such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges and immunities of such citizen, being a married woman:
>
> "*Provided*, that nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein."

It will be observed that this Act dealt with the future and was not retroactive. It did not attempt to disturb the tribal status of a white man theretofore acquired by marriage to a tribal Indian woman nor the tribal status of an Indian woman theretofore married to a white man nor did it deal with the rights of children born of such a marriage thereafter occurring.

Following the Act of 1888 a question as to the rights of children born to Indian women marrying white men subsequent to the Act of 1888 to share in tribal property arose. To make definite and certain the status of such children, Congress enacted the Act of June 7, 1897 (30 Stat. 90), which provided as follows:

> "That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right." (Pet. Brf., 172.)

It is the contention of counsel for respondent that the Act of June 7, 1897, definitely fixed the status of all children born of a marriage of an Indian woman and white man at any time theretofore as that of white citizens of the United States and that only the children of such a marriage could acquire rights in tribal property which did not extend to their children. Accord-

ingly, counsel for respondent contend that, as petitioners are the grand or great-grandchildren of such marriages they could not be possessed of an allotment right. It is the contention of counsel for petitioners that the Act of June 7, 1897, was designed to enlarge, not restrict rights, and did not affect nor disturb the status of Indian women and their children as members of Indian tribes existing prior to the Act of August 9, 1888. The Act of June 7, 1897, has been before the lower courts for construction in *Oaks et al. v. U. S.*, 172 Fed. 305; *Vezina v. U. S.*, 245 Fed. 411; *Pape v. U. S.*, 19 F. (2d) 219; *Smith v. Bonifer*, 154 Fed. 883, and other cases, in none of which does the question here raised appear to have been decided. Certainly the question does not appear to have been decided by this Court. In the case of *Vezina v. U. S.*, 245 Fed. 411, in which the marriage occurred prior to 1875, the court at page 420 calls attention to the fact that at that time the Indian woman was under the control of the United States, who recognized no authority over her but its authority, and added:

> "The court should not find upon light and trifling circumstances that an Indian has forfeited his citizenship in his tribe and in no method acquired any other citizenship, but has become literally a man without a country. It should take especially strong evidence that an Indian woman has abandoned her tribe simply by living with her husband, which she ought to do by the laws of both God and man."

The courts uniformally recognize an exception to the rule adhered to by the appellate court below and in-

sisted upon by counsel for respondent. That exception is stated in *Smith v. Bonifer*, 154 Fed. at 889, as follows:

> "The rule sustained by the weight of authority is that the status of half-breed Indians, the offspring of an Indian woman married to a white person, follows the condition of the father. To this there is an exception which obtains where the mother remains with her tribe, retaining the nurture of the children, when abandoned by the husband and father. In such cases the children become of tribal affiliation with the mother. 22 Cyc. 112; United States *v.* Hadley (C. C.), 99 Fed. 437; United States *v.* Higgins (C. C.), 103 Fed. 348; Farrell *v.* United States, 110 Fed. 942, 49 C. C. A. 183."

Such of petitioners' mothers or fathers as were born of marriages of tribal Indian women to white men, or are the issue of such marriages, were born in tribal environment, as were petitioners. In view of this situation the trial court held petitioners to be members of the Chehalis, Chinook and Cowlitz tribes. Neither the appellate court below, nor counsel for respondent here, question the tribal environment in which petitioners and their ancestors were born and lived, as found by the trial court, and as this finding brings petitioners within the exception to the general rule, it would appear that no error by the trial court appears on the face of the record and that there is no substance to the objection raised.

CASES NOS. 146, 149, 150 AND 151.

As to the claimants in these four cases counsel for respondent contend (Brf., 15) that the trial court made no specific findings as to the blood of petitioners, and therefore they are not entitled to allotments. These four cases in the trial court were numbered respectively 312, 324, 325 and 326 (Resp. Brf., 6; R., 340-3). The trial judge (R., 342) says in his opinion:

> "The facts in these four cases do not distinguish them from the decision reached by this court in case No. 272-E of the causes in this court. In that case the court decided that the mother of the plaintiffs in the present case No. 326 and the fathers in the other three cases and Agnes Elliott, the grandmother of plaintiffs in all such cases, were entitled to allotments on this reservation."

Defendant prosecuted no appeal from the decision of the trial court in case No. 272-E, nor did it incorporate in the record the decision of the trial judge in that case, which is indispensable to a proper understanding of the finding of facts by the trial court in these four cases. In the absence of the decision it is to be presumed that the trial court found the Indian tribal blood of petitioners' ancestors as appears in the findings in other cases before this Court, and found them to be of the blood of one of the tribes held by the trial court to be entitled to allotments on the Quinaielt Reservation. As the finding of facts by the trial court in all the cases now before this Court were not questioned

by the appellate court below, nor by counsel for respondent here, it would appear that this objection is without merit.

The decrees of the trial court in all of the above cases, viz, cases numbered 141 to 151, both inclusive, were reversed by the appellate court below solely on the ground that residence on the Quinaielt Reservation was a condition precedent to the right to an allotment, which will be later shown, under the third question, to have been error.

Third Question.

> "Whether residence upon the Quinaielt Reservation or upon some other reservation is a prerequisite to allotment upon the Quinaielt Reservation."

This question is dealt with by counsel for respondent in their brief, pp. 38-49. The trial court (R., 331) held that the rights of petitioners to allotments were governed by the Act of March 4, 1911 (Resp. Brf., Appx., p. 9), and the Executive Order of November 4, 1873 (R., 299-300), which correctly states the position of counsel for petitioners.

It plainly appears from the legislative history of the bill that became the Act of March 4, 1911, that the original bill as introduced authorized allotments to all members of the Hoh, Quileute and Ozette tribes for whom reservations had been "set aside," and contained no reference to residence other than that allotments should be made under the "allotment laws of the United States," which were apparently intended

to govern allotments in all respects except as to residence. The Department in its report on said bill (R., 641) advised Congress that the Quinaielt Reservation had been set aside by the Executive Order of November 4, 1873, in pursuance of the treaty of July 1, 1855, "and reserved for the use of the Quinaielt, Quileute, Hoh, and other tribes of fish-eating Indians of Washington." The Department expressed the opinion in the report (R., 642-3) "that those members of the Hoh, Ozette and Quileute Indians who are *residing on* the separate reservations set aside for them should receive allotments on the Quinaielt Reservation, and would be glad to see S. Bill 5269 enacted into law."

Thus while the Department expressed the opinion that the members of the tribes mentioned who were residing on the separate reservations set aside for them should receive allotments on the Quinaielt Reservation, it made no objection to allotments to all members of said tribes *for whom reservations had been set aside.* This was but natural in view of the physical conditions existing. In 1910, 746 allotments had been made on the Quinaielt Reservation (R., 437) and less than 200 Indians resided thereon and but few others resided on any existing reservation. Only a part of the Hoh, Quileute and Ozette Indians then resided on the little reservations set apart for their use. The Department had not been requiring residence as a condition precedent to allotment. This situation was known to the Department and was presumed to have been known to Congress when it enacted the Act of March 4, 1911, *Hy-yu-tse-mil-kin v. Smith,* 194 U. S. at

412, and it would appear that residence on either one of the little reservations or on the Quinaielt Reservation as a condition precedent to allotment was designedly omitted from the Act of March 4, 1911. The appellate court below (R., 641-3) took an erroneous view of the Departmental report, and upon this erroneous view based its opinion.

Had not the Act of March 4, 1911, directed allotments to be made

> "under the provisions of the allotment laws of the United States"

the intent of said Act would be clear. The appellate court below, and counsel for respondent here, have considered the General Allotment Act as the only applicable allotment law, completely overlooking and ignoring the evident intent of the Act of 1911, and further, article 6 of the treaty of 1855-6 (Resp. Brf., Appx. 3), which authorizes the President at his discretion to

> "cause the whole or any portion of the lands * * * to be surveyed into lots, and assign the same to such individuals or families *as are willing to avail themselves of the privilege, and will locate on the same as a permanent home.*"

It will be observed that allotments were to be made to persons who "*will* locate on the same as a permanent home." The location could be made after the allotment, no time being fixed. In the cases of petitioners, they can not locate on an allotment until it is made, otherwise they would be trespassers. In each

of the bills there is a paragraph similar to the (R., 25, par. 9) following:

> "That said plaintiff is entitled to have said land so selected allotted to him, and desires that the same be allotted to him, and that his rights be recognized and that he be permitted to go upon, live upon, cultivate and improve said land as his home."

Physical conditions precluding residence on the allotments until the timber is removed, petitioners contend that, when they have signified their intention and evidence their willingness to go upon the land when allotted them and the timber is removed, they have fully complied with the allotment laws.

The Department, certainly in practice, has not construed the Act of 1911 as requiring residence as a condition precedent to allotment. This is evidenced by the fact that, of the 1,414 Indians allotted, only 6 reside on their allotments and only 200 on the reservation, and is further evidenced by the letter of the Secretary to the Attorney General in the case of the children of Frank C. Mounts (Pet. Brf., 178-9), and by the Departmental letter dated June 13, 1930, appearing on page 45 of respondent's brief.

No question of residence as a condition precedent to allotment was raised in the trial court.

Fourth Question.

"Whether the children of a white man and an Indian woman, the latter being a member of the

Quinaielt tribe by adoption but not by blood, are entitled to allotments upon the Quinaielt Reservation."

CASE No. 152:

Counsel for Respondent (Brf., 37) concede that if Chinook Indians are entitled to allotments that petitioners in this case are so entitled. As counsel for petitioners have hereinbefore, in answering Question One, made plain the right of the Chinook Indians to allotments on the Quinaielt Reservation, the decree of the Circuit Court of Appeals should be reversed, and the decree of the trial court affirmed.

Fifth Question.

"Whether the Act of June 7, 1897, applies to the granchildren of a white man and an Indian woman."

This question is considered in respondent's brief, pp. 52-7, and deals with case No. 153, Lizzie Rolfson *et al.* The finding of the trial court appears in the record, pp. 361-4, to which reference is here made. The trial court found (R., 362) that Lizzie Rolfson, principal claimant, was born in 1870 in tribal environment, of a marriage theretofore of a Chehalis Indian woman to a white man; that she had lived "the greater part of her life at Hoquiam, near Grays Harbor"; that "her residence among and association with these Indians as well as the residence and association of her mother are sufficient to show her membership in the Chehalis tribe of Indians, in view of the fact that it has long had no tribal organization," thus bringing her

case within the ruling in *Smith v. Bonifer, supra.* The court held that she was entitled to an allotment in her own right as a Chehalis Indian (R., 364). The court further found that she was married in 1887 at Montesano, in Grays Harbor County, and divorced ten years lated. Of this marriage two sons Eugene and Alvin Smith were born. As to them the court found (R., 663-4):

> "Eugene Smith and Alvin Smith, being children of an Indian woman, by blood and not by adoption, married to a white man prior to the Act of June 7, 1897, are entitled to allotments, not because they are Indians or recognized as Indians of the tribe, but because of the foregoing act. The act provides for such allotment when the mother 'is at this time, or was at the time of her death, recognized by the tribe.'
>
> "While the mother, a Chehalis, has not been recognized by the Quinaielt and Quillehute tribes, there could have been no further recognition of her by the Chehalis under the circumstances and condition of that tribe, being without tribal organization."

The objection urged in this case by counsel for respondent has been answered under Question Two, *infra,* to which reference is here made.

CASE No. 154.

This is the case of Mary Frances Provoe *et al.,* and is dealt with in respondent's brief, pp. 38, 46-9. The finding of the trial court appears in the record, pp. 364-375, to which the attention of this Court is invited.

The trial court found as a fact that Mary Frances, principal petitioner, and through whom all other petitioners claim, was then about 74 years of age, having been born before the treaty to a full-blood Chehalis Indian woman and a white man; that she was born and had since lived in tribal environment; that in 1870 she married David Provoe, whose mother was a Stikine Indian from Alaska who had been adopted by the Cowlitz tribe; that David Provoe had been adopted by the Cowlitz tribe, and always recognized as a Cowlitz Indian; that all of the seven children of Mary Frances and David Provoe, petitioners herein, were born in the Indian country in tribal environment and have ever since lived. Counsel for respondent concede (Brf., 46) that five of petitioners reside on the Chehalis Reservation, considered by the trial court in its opinion (R., 370). The trial court further held (R., 375) that "Mary Francis, a Chehalis Indian woman by blood, by her marriage in 1870, before the Executive Order, to David Provoe, a Cowlitz, took his status, that is, by her marriage she became a Cowlitz, and their children should be classed as Cowlitz". But the court held that whether the children were classed as Chehalis or Cowlitz Indians, they were entitled to allotments. The attention of this Court is again invited to the fact that the remnant Cowlitz tribe had at the time of the Executive Order been merged with the Chehalis tribe, the Cowlitz Indians in 1885 being no longer known by that name (Bu. Am. Ethn., Bul. 30, Pt. 1, p. 355). The Cowlitz tribe having been absorbed by the Chehalis tribe, and having lost its identity in 1885, the mother, Mary Frances, if her status was

changed by her marriage in 1870 to that of a Cowlitz, resumed her original status as a Chehalis Indian and all of her children occupied the status of Chehalis Indians.

The appellate court below (R., 667) held that a Lower Chehalis Indian was entitled to an allotment, but that an Upper Chehalis or Cowlitz Indian was not, and as the trial court did not specifically find Mary Frances Provoe to be either an Upper or Lower Chehalis Indian, it reversed that part of the decree relating to her, and remanded the case (R., 668) for further inquiry by the trial court.

The appellate court below (R., 668-9) reversed that part of the decree of the trial court, decreeing the seven children entitled to allotments, on the ground that the children born of the marriage of Mary Frances to David Provoe took the status of their father, an adopted Cowlitz Indian, and the son of a white man, and as such acquired no rights.

Counsel for respondent (Brf., 46-9) apparently concede that Mary Frances and her children are entitled to allotments if under the Act of March 4, 1911, and the Executive Order, Chehalis and Cowlitz Indians are entitled to allotments, and further if residence on the Quinaielt Reservation is not a condition precedent.

Counsel for petitioners have fully discussed the right of Chehalis and Cowlitz Indians to allotments under Question One, *infra;* their rights to allotments without first establishing residence on the reservation under Question Three, *infra,* and the non-application of the Act of June 7, 1897, to the children of an Indian woman and white man born in tribal environment

where the marriage occurred prior to 1888 under Question Two, *infra*, which need not again be repeated and to which the attention of this Court is invited.

Sixth Question.

> "Whether 'recognition' of an Indian, not of Quinaielt blood, by the Quinaielt Indians as a member of the tribe, entitles such Indian to allotment upon the Quinaielt Reservation."

This question is dealt with in respondent's brief, pp. 55-7.

The appellate court below, and counsel for respondent here, have evidently misconceived the position of counsel for petitioners with reference to basic rights to allotments. Their position is clearly stated in the second paragraph under the heading "Second Question", *infra*, to which reference is here made. Adoption records and other evidence showing, or tending to show, formal recognition by the Departmental officers of petitioners' rights to allotments were introduced in the record and considered by the court. These records have some evidentiary value for the purpose for which they were introduced. The confusion arose by the adoption of an erroneous practice by the Department, of requiring the adoption by the Indians on the Quinaielt Reservation, as a condition precedent to an allotment right, of members of the Chehalis, Chinook and Cowlitz tribes. It appears that this practice obtained in all cases where Indians were admittedly members of the Chehalis, Chinook and Cowlitz tribes. This practice was unauthorized by law.

It is the contention of counsel for petitioners that they are possessed of the same basic allotment rights

possessed by all Chehalis, Chinook and Cowlitz Indians, allotted on the Quinaielt Reservation, and that their denial by the Departmental officers on the ground that they had not been adopted by the Indians on the Quinaielt Reservation or on other grounds was unjustifiable.

The Quinaielt Reservation was enlarged by the Executive Order for the sole purpose of taking care of the Chehalis, Chinook, Cowlitz and other Indians. By the treaty a reservation sufficient for the wants of the Quinaielts and Quillehutes was to be set aside. The United States bought and paid for all the ceded land. In 1863 the reservation provided for by the treaty was surveyed and embraced only 10,000 acres. By the Executive Order it was enlarged to 224,000 acres, the 214,000 additional acres being added from the land purchased by the United States, and in which the Quinaielt and Quillehute tribes had no claim of right.

CONCLUSION.

For the above and foregoing reasons counsel for petitioners respectfully submit that the decrees of the appellate court below should be reversed in all cases and the decrees of the trial court affirmed.

Respectfully submitted,

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Nos. 141-154

In the Supreme Court of the United States

OCTOBER TERM, 1930

HILARY HALBERT, JR.; DOROTHY HALBERT HUBBLE; MILDRED HALBERT, A MINOR, BY HILARY H. HALBERT, GUARDIAN AD LITEM; AND FIFTY-ONE OTHERS, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 633–670) are reported in 38 F. (2d) 795–807.

The opinion of the District Court for the Western District of Washington (R. 285–375) is not reported.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered February 24, 1930. (R. 670–685.) A petition for rehearing was denied March 31, 1930. (R.

685.) Petition for certiorari was filed May 22, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is a fish-eating Indian of the Pacific Coast, as such, entitled to allotment upon the Quinaielt Indian Reservation in the State of Washington under the Treaty with the Quinaielt and Quillehute Indians of July 1, 1855, and January 25, 1856, the Executive Order of November 4, 1873, setting apart the Quinaielt Indian Reservation "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast," the General Allotment Act of February 8, 1887, and the Special Allotment Act of March 4, 1911; or is it a prerequisite to such allotment, under the said Treaty, Executive Order and Allotment Acts, and the Act of August 15, 1894, as amended by the Act of February 6, 1901, authorizing these suits, that the said Indian shall establish—

First, that he is a recognized member of the tribe to which he claims to belong, either by blood or by adoption;

Second, that such tribe is either the Quinaielt, the Quillehute, or some of the other tribes of Indians mentioned in the Special Allotment Act of 1911 as being affiliated with the Quinaielts and Quillehutes in the treaty with said Indians concluded on July 1, 1855, and January 25, 1856;

Third, that he resides either upon the Quinaielt Indian Reservation, or upon some of the smaller Reservations created for the other tribes which are mentioned in said Act of 1911; and

Fourth, that he has applied to the Secretary of the Interior for an allotment upon the Quinaielt Reservation as a member of the tribe to which he claims to belong and that the same has been denied.

2. Is any such Indian entitled to an allotment upon the Quinaielt Reservation by reason of the fact that he has been "recognized" by the Quinaielt Indians, notwithstanding the further fact that he is not of Quinaielt Indian blood; or is such "recognition" merely equivalent to an attempted "adoption" which would not be valid unless it was approved by the Secretary of the Interior? (*Mitchell* v. *United States*, 22 F. (2d) 771.)

3. Are the children or the grandchildren of an Indian woman of one of the tribes affiliated with the Quinaielt and Quillehute Indians in the Treaty of 1855–1856, and a full-blood or mixed-blood Indian of a different tribe, not affiliated with the Quinaielt and Quillehute Indians in said Treaty, who never was "formally adopted" by the Quinaielt Tribe, entitled to allotment upon the Quinaielt Reservation, where the said children or grandchildren, although associating with and "recognized" by the Quinaielt Tribe, were nevertheless never "formally adopted" by said Tribe?

4. Does the Act of June 7, 1897, authorize allotment to the children of a white man and an Indian woman where the said Indian woman has been "adopted" by the Quinaielt Indians, she not being a Quinaielt Indian by blood?

5. Does the Act of June 7, 1897, authorize allotment to the grandchildren of a white man and an Indian woman who was a recognized member of the tribe by blood at the time of her marriage, prior to that date, in the absence of a formal adoption of said grandchildren by the tribe?

TREATY, EXECUTIVE ORDER, AND STATUTES INVOLVED

The treaty with the Quinaielt and Quillehute Indians of 1855–1856, the Executive Order of November 4, 1873, and the pertinent statutes are set out in the Appendix.

STATEMENT

The plaintiffs in these cases brought suit in the District Court for the Western District of Washington under authority of the Act of August 15, 1894, c. 290, Sec. 1, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760 (U. S. C., Title 25, Sec. 345), for the purpose of securing allotments upon the Quinaielt Indian Reservation in the State of Washington.

The cases were consolidated for trial (R. 633) and for the purposes of appeal (R. 376).

Originally there were 62 plaintiffs and sixteen cases. The District Court in a memorandum decision covering its several decrees held that all of

the plaintiffs were entitled to allotments (R. 289–375), except the plaintiff in one case (R. 349–351) and six of the plaintiffs in the remaining fifteen cases (R. 358–375).

On appeal by the Government as to the remaining fifteen cases, involving 55 plaintiffs, the Circuit Court of Appeals in four separate decisions (R. 633–670), covering fifteen decrees (R. 670–685), reversed the decrees of the District Court as to the plaintiffs included in the appeal, except that in the case of Archie Pellard (R. 351–357) the decree (R. 84) was reversed with leave to amend the complaint to show, if it be true, that the said Archie Pellard "is entitled to an allotment as a son of a recognized member of the Quinaielt Tribe and of a white man" (R. 645, 674); and that in the case of Lizzie Rolfson et al. the decree of the District Court (R. 160) was affirmed as to Lizzie Rolfson and reversed as to the other plaintiffs (R. 650–653, 683). In the case of Mary Frances Provoe et al. the decree of the District Court (R. 119) was reversed and the case remanded for further proceedings to determine whether the plaintiff, Mary Frances Provoe, is a lower Chehalis Indian, which under stipulation by counsel on both sides would entitle her to allotment (R. 653–670, 684).

Petitioners herein rely mainly upon the theory that they are either fish-eating full-blood Indians of the Pacific Coast or mixed-blood Indians coming under the saving provisions of the Act of 1897

(*infra*, p. 12.) They do not reside upon any reservation, but live in what is styled in the brief in support of the petition "the original tribal habitat of their ancestors," either at Dahlia, Shoalwater Bay, Grays Harbor, or other places in the State of Washington. Some of their relatives, including, in some of the cases, the father or mother, or both, have been enrolled on the Quinaielt roll and allotted on the Quinaielt Reservation. In some of the cases the petitioners rely upon some form of recognition by, and association with, the Quinaielt Indians, although they are not Quinaielt Indians by blood, or if possessing some degree of Quinaielt Indian blood their fathers are not Indians of the Quinaielt Tribe nor of any other tribe mentioned in the Act of 1911 (*infra*, p. 12). In some other cases the petitioners rely on the fact that their mothers were recognized members of the Quinaielt Tribe by adoption, although they themselves are not.

REASONS FOR NOT OPPOSING THE PETITION

While the decisions of the Circuit Court of Appeals were, we believe, right, at least in so far as the conclusions and decrees are concerned, and while we would, under such circumstances, ordinarily oppose a petition for certiorari, we do not do so in these cases for the following reasons:

(1) The questions involved are of public importance. They affect the eligibility for allotment on the Quinaielt Reservation of many Indians on the Pacific Coast. A decision by this Court would ma-

terially aid the Department of the Interior not only in determining what action should be taken with respect to further allotments on the Quinaielt Reservation as well as with respect to those already made thereon but also in determining the rights of other Indians to allotments upon other reservations.

(2) None of the questions involved, so far as they relate to the rights of the Indians to allotments upon the Quinaielt Reservation, appear to have been passed upon by this Court.

(3) With respect to the question of residence as a prerequisite to allotment, there is a seeming, although, we think, not an actual conflict between the decisions of the Circuit Court of Appeals herein and the decision of the same court in *Bonifer* v. *Smith*, 166 Fed. 846, and of this Court in *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401. The question should be finally set at rest.

Respectfully submitted.

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JULY, 1930.

APPENDIX

THE TREATY, EXECUTIVE ORDER, AND STATUTES INVOLVED

The Treaty with the Quinaielt and Quillehute Indians of 1855–1856, 12 Stat. 971, after providing (Article I) for the surrender of the lands and country then occupied by the different tribes and bands of said Indians, and reserving (Article II) "for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use," provided in said Article II:

> And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant.

Article VI of said treaty provides in part as follows (p. 972):

> The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians

> be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, * * * and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 6 of the Treaty with the Omahas, referred to above (10 Stat. 1043, 1044–1045), reads in part as follows:

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to

each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; * * * And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, * * * until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land.

The Executive Order of November 4, 1873 (Kappler, Indian Affairs, Laws and Treaties, Vol. 1, 2d Edition, pp. 923–924), reads as follows:

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: [Here follows a description of the reservation.]

The General Allotment Act of February 8, 1887, c. 119, Sec. 1, 24 Stat. 388, as amended (U. S. C., Title 25, Sec. 331), provides as follows:

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

The Special Allotment Act of March 4, 1911, c. 246, 36 Stat. 1345, provides:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes: *Provided,* That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

The Act of June 7, 1897, c. 3, Sec. 1, 30 Stat. 90, as amended (U. S. C., Title 25, Sec. 184), provides:

> All children born of a marriage solemnized prior to June 7, 1897, between a white man and an Indian woman by blood and not by adoption, where said Indian woman was on that date, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right.

The Act of August 15, 1894, c. 290, Sec. 1, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, Sec. 1, 31 Stat. 760 (U. S. C. Title 25, Sec. 345), reads in part as follows:

> That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit [district] court of the United States; and said circuit [district] courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * * *Provided,* That the right of appeal shall be allowed to either party as in other cases.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Nos. 141-154

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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 141. HILARY HALBERT, JR., DOROTHY HALBERT RUBBLE, MILDRED HALBERT, A MINOR, ETC., ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 142. RICH. HALBERT, A MINOR, BY FRED. P. HALBERT, GUARDIAN AD LITEM, PETITIONER, *v.* THE UNITED STATES OF AMERICA

No. 143. VERNON SIDNEY HALBERT, A MINOR, BY BENJAMIN F. HALBERT, GUARDIAN AD LITEM, PETITIONER, *v.* THE UNITED STATES OF AMERICA

No. 144. SIDNEY E. HALBERT, A MINOR, BY SIDNEY SETH HALBERT, GUARDIAN AD LITEM, PETITIONER, *v.* THE UNITED STATES OF AMERICA

No. 145. ROSE PEERS PICKERNELL, MABEL PEERS WHITE, AND AMELIA PEERS ALDEN, PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 146. LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, ETC., ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 147. MARY BARICHIO PETIT AND NORRIS PETIT, ELLIS A. PETIT, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 148. DEWITT BARICHIO AND LEDA E. BARICHIO, ROBIE D. BARICHIO, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 149. EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. ELLIOTT, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 150. CHAS. G. ELLIOTT, JR., ANNA MARIE ELLIOTT, HENRY ELLIOTT, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 151. AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 152. VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 153. LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 154. MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. PROVOE, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 141

HILARY HALBERT, JR., DOROTHY HALBERT RUBBLE, Mildred Halbert, a Minor, etc., et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 142

RICH HALBERT, A MINOR, BY FRED P. HALBERT, Guardian ad litem, petitioner

v.

THE UNITED STATES OF AMERICA

No. 143

VERNON SIDNEY HALBERT, A MINOR, BY BENJAMIN F. Halbert, Guardian ad litem, petitioner

v.

THE UNITED STATES OF AMERICA

No. 144

SIDNEY E. HALBERT, A MINOR, BY SIDNEY SETH HALbert, Guardian ad litem, petitioner

v.

THE UNITED STATES OF AMERICA

No. 145

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE, AND Amelia Peers Alden, petitioners

v.

THE UNITED STATES OF AMERICA

No. 146

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. Elliott, Etc., et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 147

MARY BARICHIO PETIT AND NORRIS PETIT, ELLIS A. Petit, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 148

DEWEY BARICHIO AND LEDA E. BARICHIO, ROMIE D. Barichio, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 149

EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. Elliott, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 150

CHAS. G. ELLIOTT, JR., ANNA MARIE ELLIOTT, HENRY ELLIOTT, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 151

AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 152

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, Catherine Walkowsky, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 153

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, ET al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 154

MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. Provoe, et al., petitioners

v.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court for the Western District of Washington, covering all the above-entitled cases (R. 285–375), is not reported. The four opinions of the Circuit Court of Appeals for the Ninth Circuit, covering all the above cases (R. 633–670), are reported as follows: *United States* v. *Halbert*, 38 F. (2d) 795; *United States* v. *Provoe*, 38 F. (2d) 799; *United States* v. *Walkowsky*, 38 F. (2d) 805; *United States* v. *Rolfson*, 38 F. (2d) 806.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered February 24, 1930. (R. 670–685.) A petition for rehearing was denied March 31, 1930. (R. 685.) Petition for writs of certiorari was filed May 22, 1930, and certiorari was granted October 13, 1930. (R. 689–692.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether members of the Chehalis, Chinook, and Cowlitz tribes of Indians are entitled to allotments upon the Quinaielt Reservation.

2. If so, whether the petitioners, or any of them, are Chehalis, Chinook, or Cowlitz Indians.

3. Whether residence upon the Quinaielt Reservation, or upon some other reservation, is a pre-

requisite to allotment upon the Quinaielt Reservation.

4. Whether the children of a white man and an Indian woman, the latter being a member of the Quinaielt tribe by adoption but not by blood, are entitled to allotments upon the Quinaielt Reservation.

5. Whether the Act of June 7, 1897, applies to the grandchildren of a white man and an Indian woman.

6. Whether "recognition" of an Indian, not of Quinaielt blood, by the Quinaielt Indians as a member of the tribe, entitles such Indian to allotment upon the Quinaielt Reservation.

TREATIES, STATUTES, AND EXECUTIVE ORDER INVOLVED

These are set forth in Appendix A (pp. I–X, *infra*).

STATEMENT

These cases were actions brought by persons of part, or mixed, Indian blood in the District Court for the Western District of Washington under the Act of August 15, 1894, as amended (pp. VII–VIII, *infra*), for the purpose of securing allotments upon the Quinaielt Reservation, located in Gray's Harbor County, in the State of Washington.

Originally there were sixteen cases, involving sixty-two plaintiffs. They were consolidated for trial (R. 376) and for appeal (R. 633). The District Court, in a memorandum decision covering all the cases, held that all the plaintiffs, except seven,

were entitled to allotments. (R. 338–375.) These seven plaintiffs did not appeal. The Government appealed all the cases, fifteen in number, in which allotments were granted. The Circuit Court of Appeals, in four opinions covering the fifteen cases (R. 633–670), affirmed the judgment of the District Court with respect to the appellee Lizzie Rolfson (R. 683), remanded the cause for further proceeding with respect to the appellees Archie Pellard (R. 674) and Mary Francis Provoe (R. 684), and reversed the decrees with respect to all the other appellees (R. 670–685).[1] All the appellees as to whom the decrees of the District Court were reversed filed petitions for certiorari. The Government filed no petition for certiorari.

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[1] The following table is presented as an aid in identification of the various cases:

Number in this court	Number in district court	Pleadings and decree of district court (record pages)	Opinion of district court (record pages)	Opinion and decree of C. C. A. 9th (record pages)
141	299E	1–14	338–[illegible]	633–645, [illegible]
142	300E	20–21	338–[illegible]	633–645, 671
143	301E	38–49	338–[illegible]	633–645, 672
144	302E	56–67	338–[illegible]	633–645, 673
145	307E	92–108	357–338	633–645, 675
146	312E	120–143	340–345	633–645, 676
147	320E	190–202	345–349	633–645, 677
148	321E	209–221	345–349	633–645, 678
149	324E	227–241	340–345	633–645, 679
150	[illegible]	248–260	340–345	633–645, 680
151	326E	267–279	340–345	633–645, 681
152	315E	169–181	358–361	646–649, 682
153	314E	150–162	361–364	650–653, 683
154	309E	109–128	364–375	655–659, 684

All the above cases were combined as Number 5922 in the Circuit Court of Appeals.

The complaint in *Hillary Halbert, Jr. et al.* v. *United States*, Case No. 141, alleges in substance (R. 2–7): That the plaintiffs are Indians and members of the Quinaielt Tribe, and at present reside in Grays Harbor County, State of Washington; that the father of the plaintiffs is an Indian duly enrolled upon the Quinaielt Reservation and that he has been granted an allotment thereon; that the plaintiffs are each entitled, under the applicable treaties and statutes, to an allotment of 80 acres upon the reservation; that the plaintiffs have always lived and associated with the Quinaielt Indians; that they have made selections of lands upon the reservation and have duly applied for allotments thereof; that the United States, its officers and agents, have refused to allot the selected lands to the plaintiffs and have excluded the plaintiffs therefrom. The answer of the United States denies that the plaintiffs are Quinaielt Indians; admits that they have been denied allotments on the reservation, but denies that they are entitled thereto. The answer admits most of the other allegations, and the jurisdiction of the trial court. (R. 8–10.)

The complaints (R. 20, 38, 56, 92, 109, 129, 150, 169, 190, 209, 227, 248, 266) and answers (R. 27, 44, 62, 98, 116, 136, 157, 176, 197, 214, 234, 254, 273) in the other cases are similar to those in Case No. 141, save for variations arising out of differences in tribal ancestry, associations, and places of residence. It is stipulated that all the petitioners have

made applications for allotments and that these have been objected to by the Interior Department. (R. 528.)

The petitioners contend in this Court that they are members of the Chehalis, Chinook, and Cowlitz tribes or bands of Indians. They predicate their rights to allotments primarily upon the Quinaielt Treaty of 1855–1856 (pp. I–III, *infra*), the Executive Order of November 4, 1873 (pp. V–VI, *infra*), establishing the Quinaielt Reservation, the General Allotment Act of February 8, 1887, as amended (pp. VI–VII, *infra*), and the Special Allotment Act of March 4, 1911 (p. IX, *infra*), dealing with allotments on the Quinaielt Reservation.

The Quinaielt Reservation, containing about 195,000 acres (R. 442–443)* is located on the Pacific Ocean, around the mouth of the Quinaielt River, roughly about half way between the Strait of San Juan De Fuca or the Makah Indian Reservation on the north and the Columbia River on the south. (See map, p. 10 of petitioners' brief.) It is a heavily timbered area, upon most of which it is impracticable to live until the timber has been cleared. (R. 383, 404, 470.) There are between 150 and 200 Indians now living upon the reservation, most of whom live at the fishing villages of Taholah and Queets. (R. 383, 466.) Apparently it is difficult

*The petitioners contend that the reservation consists of 224,000 acres. (Pet. Br. 30.) The present records of the Interior Department show the reservation as consisting of about 214,000 acres. These differences do not appear to be material.

to make a living upon the reservation except by fishing. (R. 426, 499–501, 550.)

The Quinaielt Reservation was established pursuant to a Treaty with the Quinaielt and Quillehute Indians, executed on July 1, 1855, and January 25, 1856 (pp. I–III, *infra*). The events that preceded this treaty and the history of the establishment of the Reservation are set forth in Appendix B of this brief (pp. XI–XV, *infra*). By the Treaty the Indians ceded to the United States the territory which they occupied, upon condition that an area sufficient for their wants be set aside by the President, to which place they agreed to remove. The Treaty provided that the President in his discretion might consolidate other tribes with the contracting tribes.

On November 4, 1873, the following Executive Order was issued (pp. V–VI, *infra*):

> In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory * * * be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, viz: * * *

On February 8, 1887, the so-called General Allotment Act (pp. VI–VII, *infra*) was enacted,

which provided that where any tribe or band of Indians has been or shall be "located upon any reservation" the President might survey such reservation and cause allotments thereof to be made "to each Indian located thereon." On March 4, 1911, a Special Allotment Act was enacted (p. IX, *infra*), which provided that the Secretary of the Interior should make allotments upon the Quinaielt Reservation "to all members of the Hoh, Quileute, Ozette, or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of" July 1, 1855, and January 25, 1856.

The allotment of the Quinaielt Reservation was not undertaken until 1905. Between that date and 1910 approximately 750 allotments were made. (R. 437.) In 1910 allotments upon this reservation were discontinued, apparently for the reason that the Interior Department did not consider that timber land was allottable (see *United States v. Payne*, 264 U. S. 446), until 1923, when the allotting of the reservation was resumed. (R. 428, 539.) There is sufficient allottable land upon the Quinaielt Reservation to permit about 2,200 allotments. (R. 443.) About 1,200 allotments have been made up to the present time. (R. 383.)

Only a very few allottees live upon their allotments, possibly six (R. 446), and of the 1,200 allottees only a comparatively few reside upon the reservation (R. 383, 384, 404, 412, 417, 420, 422, 426, 444, 485, 495, 542, 569, 572). Some of the allot-

tees seldom, if ever, visit the reservation (R. 417) and others visit the reservation only during the fishing season (R. 412, 572). Many of the Indians residing at Bay Center, Hoquiam, and Dahlia (see map, p. 10, petitioners brief) have allotments on the reservation. (R. 383, 403, 411, 507, 569.) Numerous Indians other than Quinaielt and Quillehute Indians have been granted allotments upon the reservation. (R. 386–387, 397, 420, 424–425, 443–444, 493, 498, 534, 538, 563.) These include Humptulip, Chinook, Bay Center Indians, Wynooche, and Chehalis Indians. (R. 386, 387, 411, 443–444, 498, 534, 538, 563.)

The record does not show upon what basis certain of these "outside" Indians were granted allotments upon the Quinaielt Reservation. In earlier years some allotments seem to have been made over the objection of the Indians upon the reservation. (R. 468, 469.) In later years the outside Indians appear to have been granted allotments only when duly adopted by the Quinaielt Tribe. (R. 439–440.) One Indian Agent testified that in 1906 he was sent to the Indians at Bay Center and Shoalwater Bay with trust patents for allotments on the reservation in an attempt to persuade those Indians to accept the patents, stating that he informed the Indians that it was not necessary for them to reside on the reservation. (R. 494, 495.) One Indian testified that he did not live upon the reservation when he was granted an allotment. (R. 425.)

None of the petitioners reside on the Quinaielt Reservation. Most of them live in the territory south and southeast of the reservation and north of the Columbia River, in what petitioners call "the original tribal habitat of their ancestors." Referring generally to the petitioners, the trial court found that "They still cling together at and about the old haunts of the former tribal organization * * *." (R. 330.) One group of the petitioners live at Hoquiam on Gray's Harbor, about thirty miles from the reservation. (R. 383, 394, 403, 408, 472; see map at p. 10 of petitioner's brief.) The petitioners concede that Hoquiam is a white community at the present time, but it was originally an Indian settlement (R. 385, 400) and a number of Indians now live and trade there (R. 389, 412, 413, 476). The Indian Agency for the various tribes in this general region is located at Hoquiam. (R. 383, 385.) Some of the petitioners live at Dahlia, an Indian fishing village a few miles from the mouth of the Columbia River. (R. 485, 491, 507, 508, 519, 520, 527, 574.) Others live at Aberdeen, located on Gray's Harbor about thirty miles from Tahola. (R. 513, 517.) Others live at Bay Center and South Bend on Shoalwater Bay, which are still Indian communities to a considerable extent. (R. 495, 542, 546, 571, 574.) Others live at Oakville on the Chehalis Reservation and at Elma on the Chehalis River. (R. 586, 596.) One petitioner lives at Moclips, at the edge of the Quinaielt Reservation (R. 597), and another lives on the

shore of Quinaielt Lake, which forms a part of the Reservation. (R. 398.) A few of the petitioners live at Astoria, Oregon, near the mouth of the Columbia River. (R. 485, 588.) One of the petitioners lives in Tacoma, Washington (R. 596), and two live in California (R. 363, 391).

The petitioners for the most part make a living by fishing (R. 389, 398, 403, 413, 426, 465, 476, 488, 508, 514, 521, 548, 563, 566), gathering oysters (R. 388, 417, 426, 495, 548), and selling furs (R. 388, 557). A few work for white people in the lumber camps. One of the petitioners is a boatman and runs an auto park on Quinaielt Lake. (R. 399.) The occupations of the two petitioners who live in California and the one that lives in Tacoma are not shown. (R. 391, 596.) Although the Government has encouraged the Indians to take up the ways of the white people, many of the petitioners and the Indians with whom they live follow the same mode of life followed by the other Indians in the Gray's Harbor country and by the Indians who reside on the Quinaielt Reservation. (R. 388, 392, 415–416, 503, 542.) Many of the petitioners are related to and visit and associate with Indians living on the Quinaielt Reservation. (R. 406, 409, 489, 507, 511, 514, 515–516, 517–518, 521, 560, 566–567, 575, 596, 598, 611–612.) Some of the Indians on the Quinaielt Reservation fish off the reservation, often going as far south as the Columbia River to fish. (R. 384, 414, 417, 426, 489, 495, 508, 515, 556, 572.)

The District Court held that members of the Chehalis, Cowlitz, Chinook, and the so-called Shoalwater Bay tribes or bands were "other Indians in that locality" and members of "other tribes of fish-eating Indians on the Pacific Coast" within the meaning of the Executive Order of November 4, 1873 (pp. V–VI, *infra*); also that they were members of "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of" July 1, 1855, and January 23, 1856, within the meaning of the Act of March 4, 1911 (p. IX, *infra*), and that, therefore, they were entitled to allotments on the Quinaielt Reservation. (R. 327, 329, 331.) Accordingly the court decreed that allotments should be made to all of those plaintiffs whom it found to be members of such tribes or bands. (R. 338–375.)

The District Court found that the petitioners in Nos. 141, 142, 143, 144 (R. 338–339), 147, 148 (R. 345–349), 145 (R. 357–358), 152 (R. 358–361), and 154 (R. 376) were Indians of either Chehalis, Cowlitz, or Chinook blood and members of such tribes or bands; that therefore they were entitled to allotments as such. The two petitioners in Case 153, who live in California, were held entitled to allotments, not because they were Indians or had been recognized as Indians, but because they were held by the District Court to be within the saving provisions of the Act of June 7, 1897, p. VIII, *infra*. (R. 361–364.) The petitioners in Nos. 146, 149,

150, and 151 were held by the District Court to be entitled to allotments because most of them had been adopted by the Quinaielt Indians at a tribal council held in 1912 (R. 340–345); the court found that these petitioners were persons of part Indian blood, who had lived as Indians and associated with the Quinaielt Indians, but did not make any finding as to the blood of these Indians.

The Circuit Court of Appeals, dividing the plaintiffs into four groups, held:

First group (*United States* v. *Halbert*, 38 F. (2d) 795)—

1. That under the General Allotment Act of February 8, 1887, as amended (pp. VI–VII, *infra*), only an Indian residing upon the Quinaielt Reservation was entitled to an allotment upon that reservation.

2. That the Act of March 4, 1911, modified the general allotment law only so as to permit allotments on the Quinaielt Reservation to Indians residing upon *other* reservations set aside for the tribes therein referred to.

3. That if the Act of June 7, 1897 (pp. VIII–IX, *infra*) makes an exception to the general rule (i. e., so as to dispense with the requirement of residence upon a reservation) that exception is applicable only to the *children* of an Indian woman and a white man, and not to the *grandchildren* of such marriage. (R. 643.)

This opinion was held applicable to the forty petitioners involved in cases Nos. 141 to 151, inclusive (R. 644–645), none of whom resided upon the Qui-

naielt or other reservation and none of whom the court found to be within the saving provisions of the Act of June 7, 1897. The court did not indicate whether in its opinion any of these petitioners would be entitled to allotments if residence upon the Quinhielt or other reservation were not a condition precedent.

Second group (*United States* v. *Provoe*, 38 F. (2d) 799)—

That Indians of Chehalis-Cowlitz blood living on the Chehalis Reservation are not entitled to allotments on the Quinaielt Reservation, since the Cowlitz-Chehalis tribes are not "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes" in the Quinaielt Treaty, within the meaning of the Act of March 4, 1911.

This opinion was applied to the petitioners in case No. 154 (R. 109, 653–669, 684), several of whom resided upon the Chehalis Reservation.* (See map, p. 10 of petitioner's brief.)

Third group (*United States* v. *Walkowsky*, 38 F. (2d) 805)—

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*The bill of complaint in this case, as in the others, alleged that the petitioners involved were "Quinaielt Indians" (R. 110), whereas the evidence showed them to be Cowlitz or Chehalis Indians. The court said that this variance would, ordinarily, excuse it from passing on the questions presented, for the reason that in a suit by an Indian for allotment it must appear that his claim has been denied by the Secretary of the Interior and that in the instant case it was shown only that the Secretary had denied a claim based on the ground that the petitioners were Quinaielt Indians. The court, however, held that since no objection was made in the trial court to the evidence presented, the variance should not be fatal. (R. 656–658.)

That the Act of June 7, 1897, granting to the "children" born of a marriage between a white man and an Indian woman the same rights to property of the tribe to which the mother belongs, "by blood," as any other member of the tribe, dispensed with the requirements of residence upon a reservation as a condition to allotment; but that this Act did not apply to the children of a Chinook-Chehalis Indian woman, married to a white man, who had been *adopted* by the Quinaielt tribe, so as to entitle the children to allotments on the Quinaielt Reservation.

This opinion was held applicable to the four petitioners in Case No. 152. (R. 169, 648–649, 682.)

Fourth group (*United States v. Rolfson*, 38 F. (2d) 806)—

That the Act of June 1, 1897 does not apply to the children of a part Indian woman (married to a white man) who herself acquired tribal rights in the Quinaielt Reservation by virtue of that Act and not "by blood," and that "recognition" by the Quinaielt Indians of the Indian blood of these children, no matter how made, was not the equivalent of an *adoption*, and did not give such children a right to allotments on the Reservation.

This opinion was held applicable to the two petitioners in case No. 153. (R. 169, 650–653, 683; see Point V, *infra*.)

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[1] One of the plaintiffs in this suit, Lizzie Rolfsen, the mother of the other plaintiffs, was held entitled to an allotment under the Act of June 7, 1897, and the decree of the court below as to this petitioner was therefore affirmed.

SUMMARY OF ARGUMENT

1. The claim of most of the petitioners for allotment on the Quinaielt reservation is predicated upon the assumption that they are Indians of the Chehalis, Chinook, or Cowlitz tribes. We submit to the Court the question whether, if the petitioners are of such blood, the applicable treaty, executive order, and statutes give them any right to allotments.

The Treaty of 1855–1856 specifically authorized the establishment of a reservation for the Quinaielt and Quillehute tribes and empowered the President to consolidate with them "other friendly tribes or bands." The Executive Order of November 4, 1873, established a reservation "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast," but recited that the purpose was to "provide for other Indians in that locality"—i. e. the locality of the Quinaielt and Quillehute Indians. Although the District Court found that the Cowlitz, Chinook, and Chehalis were tribes of fish-eating Indians on the Pacific Coast, most of them had their habitat at a considerable distance from that of the Quinaielts, and apparently they were not friendly with the Quinaielts. Indeed, the Indian Office held in 1916 that the Chinooks were not fish-eating Indians. The Special Allotment Act of March 4, 1911, authorizing the Secretary of the Interior to make

allotments on the Quinaielt reservation "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty," would hardly extend to the Chinook, Chehalis, and Cowlitz tribes, inasmuch as they expressly refused to execute the treaty. But in the administration of the reservation, some allotments thereon have been made to members of the Chinook, Chehalis, and Cowlitz tribes, both before and after the Act of March 4, 1911, and some support may be found in opinions and the practice of the Interior Department for the contention that the Executive Order of November 4, 1873, extends to the Chinooks, Chehalis, and Cowlitz Indians.

2. But, in any event, we contend that most of the petitioners do not have sufficient Chinook, Chehalis, or Cowlitz blood to entitle them to be considered as members of the Chinook, Chehalis, or Cowlitz tribes. Our position as to this matter does not challenge any statement of fact in the opinion of the District Court. The Circuit Court of Appeals did not pass upon this point.

3. The Circuit Court of Appeals held that none of the petitioners was entitled to an allotment because no one of them at the time of his application for allotment lived on the Quinaielt reservation or any other reservation which the court regarded as com-

ing within the language of the Act of March 4, 1911. This conclusion was predicated upon the language of the General Allotment Act of February 8, 1887, upon which the petitioners rely. This authorized allotments on reservations "to each Indian *located* thereon." It also held that the Act of March 4, 1911, dispensed with requirement of residence on the Quinaielt reservation only in the case of persons residing on some other reservation coming within the purview of that act.

The Government at no time contended that residence on a reservation was necessary, and the practice of the Interior Department in regard to this particular reservation has been to make allotments to nonresidents. Nevertheless, the Indian Office has made frequent rulings that seem to require residence. We consequently submit the question to this Court.

4. The children of a white man and an Indian woman who is a member of the Quinaielt tribe by adoption but not by blood are not entitled to allotments upon the Quinaielt reservation under the Act of June 7, 1897. That Act grants only to the children of a white man and an Indian woman rights in the property "of the tribe to which the mother belongs * * * by blood."

5. The Act of June 7, 1897, does not apply to the grandchildren of a white man and an Indian woman, even where the mother of the children is of part Indian blood and the father a white man.

ARGUMENT

I

ARE PERSONS WHOSE ONLY INDIAN BLOOD IS CHEHALIS, CHINOOK, OR COWLITZ ENTITLED, UNDER ANY CIRCUMSTANCES, TO ALLOTMENTS ON THE QUINAIELT RESERVATION?

The petitioners are, for the most part, persons whose only Indian blood is Chehalis, Chinook, or Cowlitz. (See pp. XI–XV, *infra*.) The District Court held that by virtue of such blood, they were entitled to allotments on the Quinaielt reservation. This holding was based upon the conclusion of the court that the tribes were "affiliated" tribes within the meaning of the 1911 Act and that they were "fish-eating Indians" on the Pacific Coast between the Columbia River and the Neah Bay reservation. Both of these conclusions are challenged by the Government here. The Circuit Court of Appeals did not expressly pass upon this point, as it reversed the cases of most of the petitioners on the ground that none of them actually resided on the Quinaielt reservation.

We submit the question to the Court. As an original proposition, a strong argument can be made, on the basis of the treaty, the executive order, and the statutes involved, that persons having blood only of these three tribes are not entitled to allotment; but the administrative practice appears to have been consciously, at times, to make allotments to members of these tribes.

We will discuss first the construction of the treaty, the executive order, and the statutes, without regard to the administrative practice.

The Quinaielt Treaty (pp. I–III, *infra*) provided that the Quinaielt and Quillehute Indians, the only contracting tribes, should cede to the United States the land occupied by them, but that there should be reserved "for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President." Article VI of the Treaty provided that the President might, in his discretion, consolidate with the contracting Indians "other friendly tribes or bands" and that he might survey the reserved land into lots "and assign the same to such individuals or families as are willing to * * * locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

Article 6 of the Treaty with the Omahas (pp. III–V, *infra*) provided that the President might in his discretion survey the reservation there involved into lots and assign them to such Indians "who will locate on the same as a permanent home." This article specified the amounts of land to be assigned to individuals or families and the terms under which the assignments should be made. Provision was made for forfeiture of such lots if the Indians failed to live thereon.

In accordance with the provisions of the Quinaielt Treaty, a reservation was selected by the Superintendent of Indian Affairs for Washington Territory adjacent to the mouth of the Quinaielt River. (R. 297.) This reservation being too small "to provide for the needs of the Indians", it was never formally established, and in 1872 the Superintendent recommended that the reservation be enlarged (stating the proposed limits thereof) and that there should be collected upon the reservation not only the Quillehute, Hoh and Quit tribes "but also all the other tribes and bands of fish-eating Indians on the Pacific coast, from the south side of Neah Bay reservation to the mouth of the Columbia River." The territory thus designated included that occupied by the Chehalis, Cowlitz, and Chinook tribes. In his report the Superintendent stated that all the tribes in this region "are emphatically fish-eaters, and draw their subsistence almost wholly from the water." (R. 297, 298.) In October, 1873, the Indian Office recommended the enlargement of the reservation as selected by the Superintendent so that the "Hohs, Quits and other fish-eating Indians residing upon the coast between the Quinaielt river and the Makah Indian Reservation may be induced to go upon the reservation." (R. 299.) It will be noted that the Indian Office materially limited the proposal of the Superintendent as to the Indians to be included. The territory thus designated clearly

excluded that occupied by the Chehalis, Cowlitz, and Chinook Indians. Thereafter the Executive Order of November 4, 1873, was issued, which provided (pp. V–VI, *infra*):

> In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 * * *, and *to provide for other Indians in that locality*, it is hereby ordered that the following tract of country in Washington Territory * * * be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and *other tribes of fish-eating Indians on the Pacific Coast*, * * *. (Italics ours.)

The District Court found that the Chehalis, Chinook, and Cowlitz Indians are fish-eating Indians (R. 328–329, 348, 357, 366–367), as are the Quinaielt and Quillehute Indians, but there is evidence that the Chehalis, Chinook, and Cowlitz tribes were not friendly with the Quinaielts and Quillehutes and had, during the treaty negotiations, refused to join with them for that reason. (R. 440; see p. XII, *infra*.)

As is shown by the map appearing in the jacket in the back cover of this brief, the habitat of the Chehalis Indians bounded, in part, that of the Quinaielts. That of the Chinooks and Cowlitz was also in the State of Washington but at some little distance from the Quinaielts. Indeed, a reference to the map indicates that the Quinaielt

Reservation was carved almost wholly from recognized Quinaielt territory alone. As an original proposition, it would seem arguable that, inasmuch as the Executive Order shows an intention to provide only "for other Indians in that locality" and that the Chehalis, Chinooks, and Cowlitz were not friendly with the Quinaielts and Quillehutes, it was not intended to give the Chehalis, Chinooks, and Cowlitz Indians rights in the Quinaielt Reservation, and that the reference to "other Indians in that locality" did not include them. The broad language in the Executive Order, "other tribes of fish-eating Indians on the Pacific Coast," might well be construed to include only such other tribes as were in the immediate locality under the principle of *ejusdem generis*, particularly since the Order itself uses the phrase, "other Indians in that locality."

If this construction is sound, it would not seem that the petitioners gained any new rights by the Act of March 4, 1911 (p. IX, *infra*), upon which they rely. That Act directed the Secretary of the Interior to make allotments on the Quiniaelt Reservation to—

> all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six

and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes. [Subject to a proviso which need not here be considered.]

The District Court held that the word "treaty" in this Act was used in the broad sense of including not only the specific agreement of the parties, but also the negotiations leading up thereto; that since the Chehalis, Cowlitz, and Chinook Indians were present at the Cosmopolis meeting, which preceded the Quinaielt Treaty (pp. XI–XII, *infra*), such tribes were properly included in the words "other tribes * * * affiliated with the Quinaielt and Quileute tribes in the treaty"; that therefore recognized members of the Chehalis, Cowlitz, and Chinook tribes were entitled to allotments upon the Quinaielt Reservation, even though not resident thereon or on any other reservation. The Circuit Court of Appeals held that the words just quoted were qualified by the subsequent words "who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes"; that the only "other tribes" which were thus contemplated were those which had had reservations set aside for them when the 1911 Act was passed; and that the 1911 Act changed the 1887 Act merely by substituting the requirement of residence on one of these other reservations, at the election of the Indian, for residence upon the Quinaielt Reservation. (R. 640–641.)

Since the Cowlitz, Chinooks, and Chehalis Indians had refused to join in the Treaty at all (p. XII, *infra*), we have difficulty in concluding that they "affiliated in the Treaty" within the intent of the Act of March 4, 1911.

The conclusion that the 1911 Act referred only to Indians residing on certain specified reservations finds support in the report of the House Committee on Indian Affairs reporting the bill which became the 1911 Act. (H. Rep. 2152, 61st Cong., 3d Sess.) This report was based upon a letter from the Secretary of the Interior to the Chairman of the Senate Committee on Indian Affairs, in which letter the Secretary expressed the view that the purpose of the Act was to enable "members of the Hoh, Ozette, and Quile ute tribes, who are residing on a separate reservation set aside for them" to receive allotments on the Quinaielt Reservation.

An examination of the history of the administration of this reservation by the Indian Office as disclosed in the Opinion of the Solicitor of the Interior Department of September 12, 1916 (R. 296-326) shows that the practice has been in nowise uniform, as illustrated by the decision of the Indian Office (R. 302) that the Chinooks were not fish-eating Indians entitled to allotments, and also by the letter of the Indian Office of March 26, 1912 (R. 310-311), stating that the enlarged reservation was to provide for fish-eating Indians between the

Quinaielt River and the Makah Reservation—which territory was not occupied by the Chehalis, Cowlitz, or Chinooks. It is certain that numerous Indians other than members of the Quinaielt and Quillehute tribes have been granted allotments on the Quinaielt Reservation. These include Indians of Chehalis, Chinook, and Cowlitz blood (p. 11, *supra*). In a long opinion rendered in September, 1916, the Solicitor of the Department of the Interior, after reviewing many previous opinions and the practice over a long period of years, seems, in spite of some inconsistent statements, to have concluded that the Chinooks and Cowlitz, at least, were entitled to allotments (R. 324–325), and, if they were, obviously the Chehalis were. A large part of this opinion is printed in the Record (pp. 296–326).

It is also significant that in 1912 a bill was introduced in Congress to amend the 1911 Act and to provide for allotment on the Quinaielt Reservation "to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute, and other fish-eating Indians of the State of Washington." (R. 315.) This bill was never reported upon by the Interior Department and did not become law. The Indian Office in a letter to the Department of the Interior dated Jan. 4, 1913, stated with respect to this bill (R. 320):

> House bill 22868, introduced April 4, 1912, but which has not yet been referred to the Department for report so far as this Office

has been advised, is designed to authorize allotments on the Quinaielt Reservation to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute, and other fish-eating Indians in the State of Washington. In view of the treaties, executive orders, and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary.

II

NONE OF THE PETITIONERS, EXCEPT POSSIBLY THOSE IN NOS. 152 AND 154, ARE OF SUFFICIENT CHEHALIS, COWLITZ AND CHINOOK BLOOD TO ENTITLE THEM TO ALLOTMENTS EVEN IF MEMBERS OF THESE TRIBES ARE ENTITLED TO ALLOTMENTS

In all of the bills of complaint the plaintiffs allege that they are members of the Quinaielt Tribe of Indians. (See for example R. 2, 21, 38.) This allegation is denied in the answer to each of the bills (see R. 9, 27, 45, etc.), and no one of the petitioners has shown that he is a member of the Quinaielt tribe. The petitioners for the most part now rely upon the fact that they are, to some degree, of Chehalis, Chinook, or Cowlitz blood. The District Court, after stating their ancestry, found that most of the petitioners were Chehalis, Chinook, or Cowlitz Indians. (See pp. 14–15, *supra*.) Apparently, no objection was made to evidence in regard to this blood. Although the opinion of the

District Court evidently predicated relief upon this conclusion, its decrees contained no mention of this assumption. No assignment of error specifically challenges the conclusion of the District Court that the petitioners are Chehalis, Chinook, or Cowlitz Indians, but there are broad, general assignments of error to the effect that the District Court erred in finding that the petitioners were entitled to have the land allotted to them and the like. (See, for example, R. 15–18.) In view of the fact that the opinion of the District Court sets out the lineage of each person, and that we do not challenge the accuracy of the District Court in regard to the facts of lineage, it seems admissible on the state of the record to contend that the facts as found by the District Court were not sufficient to warrant it in treating the petitioners as members of these tribes. The following is an analysis of the testimony applicable to each of the cases. Except for the petitioners in Nos. 146, 149, 150, and 151 (see Point VI, *infra*), it is not contended that any of these petitioners have been adopted by the Quinaielt Indians.

Case No. 141. The legal status of the petitioners in this case is that of white persons. They are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of the petitioners is a son of this union. (R. 338–339, 418, 425, 427.) The general rule is that the children of a white man

and an Indian woman follow the condition of their father. *Pape* v. *United States*, 19 F. (2d) 219 (C. C. A. 9th); *Smith* v. *Bonifer*, 154 Fed. 883, affirmed 166 Fed. 846 (C. C. A. 8th); *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8th); *United States* v. *Hadley*, 99 Fed. 437 (C. C. D. Wash.); *United States* v. *Ward*, 42 Fed. 820 (C. C. S. D. Cal.); *State* v. *Nicolls*, 112 Pac. 269; *Keith* v. *United States*, 8 Okla. 446; *Ex parte Reynolds*, 5 Dill 394, Fed. Case, 11,719. See *Oakes* v. *United States*, 172 Fed. 305 (C. C. A. 8th). The Quinaielt Indians, like the Chehalis and the Cowlitz, belong to the Salish family (Handbook of American Indians, Part 1, p. 418). The District Court held that members of the Salish family trace their lineage through the male ancestors and not through the female. (R. 374–375.)

As petitioners' grandmother was the daughter of a white man and an Indian woman, her legal status was that of a white person. As she herself married a white man her children, petitioners' father, the offspring of this union, must be regarded as white. Petitioners' mother is white (R. 338–339), and petitioners themselves can be regarded as nothing else but whites, notwithstanding their one-eighth degree of Indian blood.

Petitioners seem to rely upon the admission by the Government that they are Indians. But this admission, we submit, does not include also an admission that in the event that the evidence should establish that they are of Chehalis Indian

blood, their status should be regarded as that of Chehalis Indians, meaning by that term, members of the Chehalis Tribe of Indians, if there be such a tribe.

The term "Indian" in its general and natural sense means only a person of the Indian race, whether a member of a tribe or not. The idea of membership in a tribe is not necessarily included in the term "Indian." A person may be an "Indian" and yet not a "tribal Indian"; that is, an Indian who is a member of a tribe. *Frazee* v. *Spokane County*, 69 Pac. (Wash.) 779; *State* v. *Lewis*, 88 Pac. (Wash.) 940.

The contention that petitioners are Chehalis Indians completely overlooks the fact that their status is that of white persons and not that of tribal Indians. The fact that petitioners in these cases may possess a greater or less degree of Chehalis Indian blood is not sufficient to invest them with the status of members of any tribe of Indians. The rule, or rather an exception to the general rule concerning mixed-blood Indians, is that the child of a white man and an Indian woman, who is abandoned by his father, and who is nurtured and reared by the Indian mother in the tribal relation, and recognized by the tribe as a member of it, becomes a member of the tribe of the mother. *Farrell* v. *United States, supra.* See also *Smith* v. *Bonifer, supra*; and *United States* v. *Hadley, supra.*

Case No. 142. These petitioners are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of petitioners is a son of this union. Petitioners' mother is white. (R. 338–339, 418, 425, 427.)

Case No. 143. These petitioners are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of petitioners is a son of this union. Petitioners' mother is white. (R. 338–339, 418, 425, 427.)

Case No. 144. The petitioners are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of petitioners is a son of this union. Petitioners' mother is white. (R. 338–339, 418, 425, 427.)

Case No. 146. The paternal grandmother of these petitioners, Agnes Ducheney, was a daughter of Mary E. Rondeau of Chinook lineage and a man by the name of Roque Ducheney, half French and half Indian. (R. 511–512.) Agnes Ducheney married a white man by the name of Elliott. (R. 511.) The father of the petitioners herein is a son of this union. (R. 511, 512, 518.) The blood relation of petitioners' mother does not appear.

The District Court found that these petitioners were "adopted" into the Quinaielt tribe at a tribal council of the Quinaielt Indians convened on April 4, 5, and 6, 1912. (R. 342–345.) There is no pretense, however, that such "adoption" was ever approved by the Secretary of the Interior in conformity with departmental regulations concerning the subject. (See Point VI, *infra*.)

Petitioners contend, however, that while their "adoption" by the Quinaielt Tribe may not be valid by reason of the fact that it was not approved by the Secretary of the Interior, such "adoption" should nevertheless be regarded as a "recognition" of their membership in the tribe.

The term "recognition of membership in the tribe" presupposes, we submit, a pre-existing membership in the tribe by reason of the circumstances of birth and tribal affiliations of the person so recognized; otherwise there can be no recognition, but merely an attempted adoption. Such was the case, for instance, in *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401; *Smith* v. *Bonifer*, *supra*; *Farrell* v. *United States*, *supra*; *United States* v. *Hadley*, *supra*.

Case No. 149. The paternal grandmother of these petitioners, Agnes Ducheney, was a daughter of Mary E. Rondeau, of Chinook lineage, and a man by the name of Roque Ducheney, half French and half Indian. (R. 511–512.) Agnes Ducheney married a white man by the name of Elliott. (R. 511.) The father of the petitioners herein is a

son of this union. (R. 511, 512, 518.) The blood relation of petitioners' mother does not appear.

Case No. 150. The father of the petitioners herein is a brother of the father of the petitioners in case 149. The mother of petitioners is a white woman. (R. 510, 511, 512, 518.)

Case No. 151. The mother of the petitioners herein is a sister of the fathers of the petitioners in Cases 149 and 150. (R. 511, 512–518.) She married a white man. (R. 490–491.) The status of petitioners, following that of their father, is that of white persons.

Case No. 147. The great grandmother of the petitioners in this case was a full-blooded so-called Shoalwater Bay Indian. Her ancestry may have been a mixture of Chehalis, Chinook, and Quinaielt. (R. 349, 550, 551, 555.) She married a white man—an Italian by the name of Barichio. (R. 551.) Frank Barichio, the grandfather of petitioners, was a son of this union. (R. 551.) His status, following that of his father, was that of a white person. He married one Lena Givens, reputed to have some Indian blood, but she was mostly white. (R. 551.) Mary Barichio, petitioner, was a daughter of this union (R. 551, 569), and her status, following that of her father, was that of a white person. She married Paul Petit, an Indian whose blood relation does not appear. (R. 552, 553, 569, 570.) The record does not show that Paul Petit is a member of any tribe. He was born at Bay Center and has lived there practically

all of his life. His name indicates that some of his male ancestry is white.

As to the other petitioner, Oscar Brignone, the record shows that his father was a man named Brignone who lived on the Columbia River and whose blood relation does not appear. (R. 552, 553, 570.) His name, Brignone, indicates that either his father or some of his more remote male ancestry was French. His mother was a full sister of Frank Barichio (R. 550), and her status, like his, was that of a white person.

Case No. 148. Dewey Barichio, one of the petitioners herein, was a son of Frank Barichio and Lena Givens, referred to in case No. 147. His status, following that of his father, Frank Barichio, is that of a white person. He married an Indian woman whose blood relation does not appear. (R. 551, 569, 570.) Leda E., Romney D., and Andrew B. Barichio, the other petitioners herein, being children of this union (R. 551, 569, 570), and following the status of their father, must be also regarded as white persons.

Case No. 145. The petitioners in this case are children of Henry Peers and Julia or Judith Ducheney, both deceased. (R. 93, 98, 99, 575.) The record indicates that Henry Peers' mother was a Lower Chehalis or Chinook Indian. (R. 519, 561.) The record also indicates that Henry Peers came from Canada or British Columbia. (R. 576.) Who his father was does not appear. Julia or Judith Ducheney was a full sister of Agnes

Ducheney Elliott, whose father was half French and half Indian. (R. 511, 512, 519, 520.) There is nothing in the record to show that either Henry Peers or Judith Ducheney was ever recognized as a member of the Quinaielt tribe by blood or that the petitioners have ever been adopted into the Quinaielt tribe.

Case No. 152. Kate Walkowsky, mother of the petitioners in this case, was born in 1874 at Oysterville, on Shoalwater Bay. (R. 359, 521, 646.) Her mother was an Indian of the Wynooche band of the Lower Chehalis Indians and her father was full-blooded Chinook Indian. (R. 360, 522, 646.) For reasons already stated Kate Walkowsky Weiss took the status of her father, a Chinook Indian, and not that of her mother. (R. 646–647.) Kate Walkowsky married John Walkowsky, a white man (R. 359, 521, 646), and the status of her children born of this union is that of white persons. Nevertheless, if Chinooks are entitled to allotments the petitioners in this case would seem to be entitled to them under the provisions of the Act of June 7, 1897. (But see Point IV, *infra*.)

Case No. 153. Lizzie Rolfson, mother of the two petitioners in this case, was the daughter of a white man and a Chehalis Indian mother. (R. 362.) She was born on her father's homestead. Her status, following that of her father, was that of a white man. (R. 472.) Petitioners Alvin and Eugene Smith are children of Lizzie Rolfson and a white man (R. 362, 474), and their status, fol-

lowing that of their father, is therefore that of white persons.

Case No. 154. Mary Francis Provoe, petitioner, and the mother of the other petitioners in this case, was the daughter of a white man and a Chehalis Indian woman. She married David Provoe, a Cowlitz Indian by adoption, and both of the courts below found that her status, as well as that of her children, following that of the husband and father, is that of Cowlitz Indians. (R. 375, 668.)

III

MAY A CLAIMANT OBTAIN AN ALLOTMENT ON THE QUINAIELT RESERVATION IN SPITE OF THE FACT THAT HE DID NOT AT THE TIME OF HIS APPLICATION RESIDE UPON THE QUINAIELT OR OTHER RESERVATION?

Although the Government at no time contended that such residence was a prerequisite to an allotment, the Circuit Court of Appeals refused relief to most of the petitioners on the ground that it was a prerequisite. In view of this holding, we submit this question to the Court for decision.

The argument in support of this conclusion of the Circuit Court of Appeals is made in its opinion. (R. 633–645, 653–670.) Although it did not discuss the matter, the District Court clearly did not regard residence on a reservation as necessary. Except for the petitioners in case No. 154, some of whom reside upon the Chehalis Reservation, none of the petitioners reside upon the Quinaielt or other reservation. The Circuit Court of Appeals held

that residence upon the Chehalis Reservation was not sufficient.

The first statutory provision upon which the petitioners base their claims for allotments is the General Allotment Act of 1887 (pp. VI–VII, *infra*). Section 1 of that Act provides:

> That in all cases where any tribe or band of Indians has been or shall hereafter *be located upon any reservation* created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to *each Indian located thereon* to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. (Italics ours.)

Support for the conclusion of the Circuit Court of Appeals is found in Section 4 of the General Allotment Act of 1887, which provides that "where any Indian *not residing upon a reservation*, or for whose tribe no reservation has been provided," shall make a settlement upon any lands of the United States not otherwise appropriated, such Indian shall be entitled to an allotment upon such lands in the same manner as provided for "Indians residing

upon reservations." The two sections together afford the basis for contending that Section 1 was intended to provide for Indians who resided upon reservations and that Section 4 was intended to provide for Indians who do not reside upon reservations.[5] Moreover, the conclusion of the Circuit Court of Appeals finds some support in the statement of the court in *Lemieux* v. *United States*, 15 F. (2d) 518, 521 (C. C. A. 8th), certiorari denied, 273 U. S. 749, that:

> No case has been cited, and we have been unable to find any, which holds that a tribal Indian, living apart from the Tribe and off the reservation, is entitled to an allotment under section 1 of the act of 1887, and the language of that act seems to preclude such a holding.

Petitioners rely upon the case of *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, *supra*. In that case, which involved the allotment Act of March 3, 1885, c. 319, 23 Stat. 340, relating to the bands of Cayuse, Walla Walla and Umatilla Indians "residing upon the Umatilla reservation," it was held that it was not necessary, for an allotment, that individual members of the tribes mentioned should be actually residing upon the reser-

[5] It is clear that the word "located" in this Act has no reference to any particular time and that "being on the reservation at the instant of time the act was passed" is not a necessary condition. *Fairbanks* v. *United States*, 223 U. S. 215, 225.

vation at the time of the passage of the Act, and that the language quoted related to the residence of the Indians upon the reservation as "bands" and not as "individual Indians." That treaty, like the Quinaielt Treaty, contained a provision requiring the Indians to remove to the reservation within one year, but the Court found that many Indians had not removed to the reservation when the allotment Act in question was passed. The Court stated (p. 412) that the purpose of the treaty and the Act was to induce the Indians to break up the tribal relations and adopt the habits of an agricultural people, and that this purpose would fall short of accomplishment if the allotments were "confined exclusively to those actually residing within the limits of the reservation, while those who were absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled * * * simply because of residence outside of * * * the reservation." That case, however, did not involve the General Allotment Act.

In *Bonifer* v. *Smith*, 166 Fed. 846 (C. C. A. 9th), which also involved the Act of March 3, 1885, the court, on authority of the *Hy-Yu-Tse-Mil-Kin case*, held that a member of the Walla Walla Tribe was entitled to an allotment upon the Umatilla Reservation, even though she did not reside thereon or even within the territory originally ceded by those Indians to the United States.

The petitioners contend that it is unreasonable to require residence upon the Quinaielt Reservation as a condition to allotment thereon because the physical character of the land is such as to preclude residence there until the timber has been removed. That much of the reservation is covered with timber is clear. But that not all the reservation is uninhabitable is apparent because of the fact that more than 150 Indians dwell thereon, and many Indians, including some of the petitioners, visit the reservation and fish there. (Pp. 9–14, *supra*.) If the applicable statutes require residence thereon as a condition to allotment, it does not seem that the mere fact that much of the reservation is difficult of residence, until the timber is cleared, would dispense with the statutory requirement. The presence of the timber would simply require the prospective allottee to clear the timber. See *United States* v. *Payne*, 264 U. S. 446, 449. If the statute requires residence, and residence because of the physical conditions is difficult, the remedy, if any is needed, is a matter for legislative, not judicial, cognizance.

The petitioners apparently contend further that they have never had an opportunity to reside on the reservation and in fact that access to the reservation has been denied them. (Pet. Br. 40–41.) This contention is based upon the allegations in the complaints that the United States, its officers and agents, "have denied and excluded, and still deny and exclude plaintiffs herein from said land,

and have refused and still refuse to let said plaintiffs go upon or reside upon said lands." (R. 6, etc.) The answer filed by the United States to these allegations admitted that the United States "has refused to allot certain lands to the plaintiffs herein, but denies that said refusal was wrong." (R. 10, etc.) The allegations of the complaints obviously relate to exclusion, not from the reservation, but merely from the lands selected by the petitioners for allotment. (See paragraph X, R. 6.) Not only is there no evidence in the record that petitioners were denied such access, but there is evidence that some of them visited the reservation frequently and associated with the Indians thereon. (P. 13, *supra.*)

Some light is thrown upon the question of residence as a necessary condition to allotment by the views of the executive department charged with the administration of the allotment laws.

On September 12, 1916, the Solicitor for the Interior Department, in the memorandum for the Secretary of the Interior above referred to, made a detailed review of the statutes, treaties and executive orders having a bearing upon the question of allotments upon the Quinaielt Reservation, and prior opinions of the Department with respect thereto, and concluded (R. 324):

> * * * that only those Indians whose tribes or bands were parties to the treaty of 1855 and 1856, or are members of the tribes

or bands named in Executive Order of November 4, 1873, and the Act of March 4, 1911, or are found to be in affiliation with the Indians of Quinaielt reservation, and who have not received allotments on the reservations of their respective tribes or bands; and, furthermore, *who remove to and take up their residence on said reservation as indicated by Article 6 of the treaty of 1855–1856,* are entitled to enrollment and allotment on that reservation. (Italics ours.)

While the Solicitor in this opinion was not primarily concerned with the specific point now under discussion, it is of some significance that one of the requirements for allotment stated was that the Indians "remove to and take up their residence on said reservation as indicated by Article 6 of the treaty of 1855–1856." And the Indian Office has made frequent rulings that seemed to fix residence requirements. (R. 297, 303, 308, 311–312, 317, 318, 322, 323, 324.)

As to the actual practice in the past with respect to granting allotments, the record is not clear. It is certain that numerous Indians other than the members of the Quinaielt and Quileute tribes have been granted allotments thereon. These include Indians of Chinook, Chehalis and Cowlitz blood. Only a negligible number of allottees live on their allotments and only a relatively small number of the 1,200 allottees live on the reservation. (P. 11,

supra.) There is evidence in the record that in the past allotments have been granted to some Indians who were not residing upon the reservation at the time. (R. 494–495, 425. See pp. 11–12, *supra.*) But although the record does not show with any certainty whether in the past residence upon the Quinaielt reservation, or on some other reservation, has been required as a condition precedent to the granting of an allotment, the Attorney General was advised by the Interior Department by letter dated June 13, 1930, as follows:

> In your letter you asked for information as to what has been the custom of the Department with reference to residence upon the reservation as an indispensable prerequisite to allotment thereon. The matter of residence upon the reservation was not insisted upon as a prerequisite to allotment, either before or after the passage of the Act of March 4, 1911 (36 Stat. L., 1345) so far as the Quinaielt and other Indians mentioned in the Act or those who were affiliated with the Quinaielt in the Treaty of 1855 and 1856 are concerned. A number of allotments have been made to those who have resided away from the reservation.

The Department of the Interior and the Department of Justice in 1929 discontinued the defense to a bill in equity seeking an allotment on the reservation in question, although it appeared that the

plaintiff, a Quinaielt Indian, had never resided upon the reservation. (For copies of the correspondence, see petitioner's brief, pp. 176–180.)

Case No. 154, *Mary Francis Provoe et al. v. United States*, involves a Chehalis woman, who had married a person who was a Cowlitz (by adoption), and her seven children, all of whom are seeking allotments on the Quinaielt Reservation. Five of these eight petitioners reside on the Chehalis Reservation;* this is the only one of the cases before this Court which involves any petitioners who actually reside upon a reservation.

Assuming that residence upon the Quinaielt Reservation, *or upon the reservation of some other tribe contemplated by the Act of March 4, 1911*, is a requisite to allotment upon the Quinaielt Reservation (as held by the Circuit Court of Appeals), Case No. 154 presents the question whether residence upon the Chehalis Reservation is sufficient.

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* Mary Francis Provoe, the mother of the other eight petitioners in case No. 154, and her children, William Provoe, Frank Provoe, Raymond Provoe, and Rose Garrard, live at Oakville on the Chehalis Reservation. (R. 586, 590, 599.) John Provoe, one of the original plaintiffs in this suit, is now dead. (R. 586.) The other three petitioners in this case do not live on the Chehalis Reservation. Sarah Spencer used to live at Oakville but for the last few years has lived at Moclips, just on the edge of the Quinaielt Reservation. (R. 596–597.) Laura Brown lives at Black Lake. (R. 596), which is not far from Tumwater (R. 367; see map at p. 10, petitioners' brief), Isabelle R. Ramey lives at Tacoma, Washington. (R. 596.)

The Circuit Court of Appeals held that residence upon the Chehalis Reservation did not meet the statutory requirements because, in its opinion, the Cowlitz and Chehalis Indians were not "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes" in the Treaty of 1855–56, within the meaning of the Act of March 4, 1911. (R. 653–669.) The court did not express an opinion whether these petitioners would be entitled to allotments if the court was wrong in its construction of the statute.

The treaty proposed by Governor Stevens to the tribes assembled at the Cosmopolis meeting provided for the cession to the United States, roughly, of the territory on the Pacific Coast between the Makah Reservation on the north and the Columbia River on the south.[1] This territory unquestionably included the land then occupied by the Chehalis, Cowlitz and Chinook tribes. (Pp. XII, XIV–XV, *infra*.) For reasons set forth in Appendix B, pp. XI–XV, *infra*, these tribes refused to sign the proposed treaty. The Quinaielt Treaty, signed in 1855–56, executed only by the Quinaielt and Quillehute tribes, provided for cession to the United States of the lands on the Pacific Coast south of the Makah Reservation *only to the dividing ridge between the Chehalis and Quinaielt (Quiniatl) Rivers.*

[1] See map in pocket at the end of this brief; see map at p. 10 of petitioners' brief. See Art. I of abortive treaty proposed by Gov. Stevens at Cosmopolis. See also Swan, "The Northwest Coast," pp. 343–344.

(P. I, *infra*.) This land included only a small part of the Chehalis-Cowlitz territory and apparently none of the Chinook territory.*

The decision of the Circuit Court of Appeals that the Chehalis, Cowlitz and Chinook Indians were not "other tribes * * * affiliated with the Quinaielt and Quileute tribes" in the Quinaielt Treaty was based chiefly upon the fact that the tribes mentioned refused to sign the treaty originally proposed, and that in the treaty as finally executed most of the lands occupied by the Chehalis, Cowlitz and Chinook Indians at the time of the treaty were not included in the lands ceded to the United States. The District Court took the position that the word "treaty" in the Act of 1911 included not only the technical agreement between the parties but the negotiations leading up thereto, and that as the Cowlitz, Chehalis and Chinook tribes were represented in these prior negotiations (p. XI, *infra*), they were, therefore, affiliated with the Quinaielt Indians "in the treaty", within the meaning the statute.

The Circuit Court of Appeals also took the view that, under the rule of *ejusdem generis*, the words "other tribes * * * affiliated * * * in the treaty" referred only to tribes affiliated with the Quinaielt and Quileute tribes as the "Hoh, Quileute, Ozette" tribes were affiliated therewith. It then

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*Only two of the petitioners in all the cases before the court reside within the area ceded by the treaty. (Pet. Br. 38–39.)

found that the Hohs were really a band of the Quileute Indians, and the Quits were really a subdivision of the Quinaielt tribe, whereas the Chehalis, Cowlitz, and Chinook Indians were wholly independent tribes. The Ozettes, also expressly named in the 1911 Act, were not related to the Quinaielt or Quileute Indians, so far as the record discloses, any more closely, save by proximity of residence, than the Chehalis, Cowlitz, or Chinook Indians. The court gave meaning to the words "other tribes * * * affiliated * * * in the treaty" by finding them applicable to the Quit Indians. But the court had already found that the Quits, for whom no separate reservation has been set apart, were a subdivision of the Quinaielts, and, therefore, would appear to be entitled to allotments on the reservation wholly apart from the 1911 Act.

IV

CHILDREN OF A WHITE MAN AND A CHINOOK-CHEHALIS INDIAN WOMAN, WHO HAS BEEN ADOPTED BY THE QUINAIELT TRIBE AND WHO HAS BEEN GRANTED AN ALLOTMENT ON THE QUINAIELT RESERVATION, ARE NOT BY REASON THEREOF ENTITLED TO ALLOTMENTS ON THE RESERVATION UNDER THE ACT OF JUNE 7, 1897

Case No. 152, *Virginia Walkowsky, et al.* v. *United States,* involves three petitioners who are the youngest children of Kate Walkowsky Weiss. (R. 169, 648–649, 682.) Kate Walkowsky Weiss

was a full-blood Indian, her father being a Chinook Indian and her mother a Wynooche Indian of the Chehalis Tribe. (R. 358–360.) In 1893 she married John Walkowsky, a white man, by whom she had eleven children. The mother and her first eight children were adopted by the Quinaielt Tribe and were granted allotments on the reservation. Subsequent to this adoption the other three children, who are petitioners here, were born. Thereafter these three petitioners were refused adoption by the Quinaielt Tribe. (R. 359–361, 524–525.) They contend that they are entitled to allotments under the Act of June 7, 1897 (pp. VIII–IX, *infra*), which provides:

> That all children born of a marriage heretofore solemnized between a white man and an Indian woman *by blood and not by adoption*, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, *by blood*, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right. (Italics ours.)

If Kate Walkowsky Weiss was not entitled to allotment on the Quinaielt Reservation *by blood*, but only by reason of the fact that she was *adopted* by that tribe, then the decision of the Circuit Court

of Appeals that her children (the petitioners in Case No. 152) were not entitled to allotments upon the reservation by reason of the above statute, seems to be clearly correct. The 1897 Act expressly refers to the property "of the tribe to which the mother belongs * * * * *by blood.*"

But the petitioners contend that the adoption of Kate Walkowsky Weiss was an unnecessary act and that she was entitled to an allotment upon the Quinaielt Reservation *by blood*, wholly apart from her adoption by the tribe. They rely upon the fact that her mother was a part Lower Chehalis Indian and point to the stipulation of the parties that members of the Lower Chehalis tribe are entitled to allotments on the Quinaielt Reservation. (R. 421, 652.) But although Kate Walkowsky Weiss' mother was a Lower Chehalis Indian, her father was a Chinook Indian and her tribal rights would, therefore, be in the Chinook Tribe rather than in that of her mother.[1] *Pape* v. *United States*, 19 F. (2d) 219, 221 (C. C. A. 9th); *Smith* v. *Bonifer*, 154 Fed. 883, 889, affirmed, 166 Fed. 846 (C. C. A. 9th); *Farrell* v. *United States*, 110 Fed. 942, 944 (C. C. A. 8th).

Accordingly, it can not be said that the mother was entitled *by blood* to the rights of a member in

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[1] The District Court found that in the Salish Tribes, which include the Chehalis group, lineage is traced through the male ancestry. (R. 374–375.)

the property of the Quinaielt Tribe,[10] and it follows that the petitioners in Case No. 152 are not entitled under the Act of June 7, 1897, to allotments. See *Oakes* v. *United States*, 172 Fed. 305 (C. C. A. 8th).

The petitioners contend that the Circuit Court of Appeals found that Kate Walkowsky Weiss was a half-blood whereas the record shows that she was a full blood Indian. (Pet. Br. 51.) In view of the foregoing, this alleged error would seem to be immaterial.

V

THE ACT OF JUNE 7, 1897, DOES NOT APPLY TO THE GRANDCHILDREN OF A WHITE MAN AND AN INDIAN WOMAN

Case No. 153, *Lizzie Rolfson, et al.* v. *United States* (R. 150, 361–364, 650–653, 683), involves two petitioners who are the children of a white man and one Lizzie Rolfson (R. 151, 158, 362). Lizzie Rolfson was the daughter of a white man and a Chehalis (Upper or Lower) Indian woman.[11] (R. 362, 651.) In 1918 Lizzie Rolfson, her four children and two grandchildren, applied to the Quinaielt Indians for enrollment and adoption. This application was refused, and the refusal was approved by the Secretary of the Interior. (R. 651.) The

[10] Unless, of course, as held by the District Court, Chinook Indians are entitled to allotments upon the Quinaielt Reservation without the necessity of adoption by the Quinaielt Indians, and even though not residing upon the Reservation.

[11] The mother of Lizzie Rolfson was found by the District Court to have been tribally recognized as a member of the Chehalis Tribe. The Circuit Court of Appeals treated the question as if the mother was a Lower Chehalis Indian.

District Court granted allotments to Lizzie Rolfson and to Eugene Smith and Alvin Smith, the children of Lizzie Rolfson, by her first marriage to a white man, which occurred prior to June 7, 1897. (R. 363.) Allotments to the other two children and the grandchildren were denied.

The Circuit Court of Appeals, treating the evidence as establishing that Lizzie Rolfson's mother was a Lower Chehalis woman, held that Lizzie Rolfson was entitled to an allotment and to this extent affirmed the decree of the trial court. It denied allotment to the two children of Lizzie Rolfson, petitioners here, on the ground that the Act of June 7, 1897, did not extend to the *grandchildren* of a white man and an Indian woman, even where, as here, the mother was of part Indian blood and the father a white man. (R. 651.) Only the claims of these two children are involved in Case No. 153. (Pet. Br. 108, 158.)

The petitioners in Case No. 153 rely upon the Act of June 7, 1897. But, although Lizzie Rolfson's mother may have been a Lower Chehalis woman, her mother married a white man and her daughter, a half-breed, also married a white man. It seems clear from the discussion in Point IV, *supra*, that Lizzie Rolfson's rights in the tribal property of the Quinaielt Tribe do not arise "by blood," but by the Act of June 7, 1897. That being the case, we see no basis in the statute for applying the Act to *her children*, and we, therefore, submit that

the decision of the court below in this respect is sound. See *Chase* v. *United States*, 172 Fed. 305 (C. C. A. 8th), *supra*, and *Reynolds* v. *United States*, 205 Fed. 685 (D. So. Dak.). See also *William Banks Case*, 26 Land Dec. 71.

The Circuit Court of Appeals, in answer to the contention that the children of Lizzie Rolfson had been "recognized" by the Quinaielt Indians as members of the tribe (although they now live in California, R. 473), held that "recognition of the Indian blood of the children, no matter how made, would not be the equivalent of an adoption." (R. 651.) We know of no authority to the contrary. Where the Indian blood of a person is in doubt, recognition of that person as a member of the tribe might well be accepted as establishing that that person was a member of that tribe by blood, but where, as here, the Indian blood of the petitioners is definitely known, mere "recognition" can not take the place of adoption. See *United States* v. *Work*, 6 F. (2d) 694, 696 (Ct. of App. D. C.).

The petitioners allege that the Circuit Court of Appeals denied allotments to the petitioners because they were "citizens of the United States." We do not think that the decision of the court can be so construed. The reference by the court to the fact that the petitioners were citizens of the United States was for the purpose of pointing out that their status was not that of tribal Indians and, therefore, that they were not entitled, *per se*, to allotments upon the reservation.

VI

OTHER CONTENTIONS OF THE PETITIONERS

Certain of the petitioners have fathers or mothers or various other relatives who have been enrolled and granted allotments upon the Quinaielt Reservation. Apparently it is contended that this fact places the stamp of Quinaielt Indians upon the petitioners so as to qualify them for allotments upon the reservation. But the mere fact that one, or even both, of the parents of an Indian have been enrolled and have been granted allotments upon the reservation does not mean that the Indian is therefore entitled to enrollment and allotment. It is possible for a person having no Indian blood whatever to be adopted by the Quinaielt Indians and he may then be enrolled and granted an allotment upon the reservation. See *United States* v. *Mitchell*, 22 F. (2d) 771 (C. C. A. 9th). But this affords no basis for holding that the children of such a person would have all the rights in the tribal property of the Quinaielt Indians that a member of that tribe *by blood* would have.

We submit that the legal status of these petitioners and that of their parents or other relatives who have been enrolled and granted allotments upon the reservation was fixed by the circumstances of their birth, and was not changed by enrollment of and allotment to the parents or relatives. Whether such enrollment and allotment were lawful or otherwise can not be determined

here. The fact that such enrollment and allotment were made can not serve to create for the petitioners a different legal status than that which they acquired by birth or blood. (R. 452.) See *United States* v. *Hadley*, 99 Fed. 437, 438 (D. Wash.); *United States* v. *Higgins*, 110 Fed. 609, 611 (D. Mont.).

If the Indian blood of a person were in doubt, the fact that a parent or relative was enrolled in and granted an allotment upon the reservation of a certain tribe might be evidence that the blood of that person was of that tribe. Where the blood of the Indian is known, and is such as not to entitle him, *per se*, to an allotment upon the Quinaielt Reservation, the mere fact that his parents are enrolled and granted allotments there does not help him. *Pape* v. *United States*, 19 F. (2d) 219 (C. C. A. 9th).

The District Court found that certain of the petitioners (those in Cases 146, 149, 150, and 151) had been "adopted" into the Quinaielt Tribe at a tribal council of the Quinaielt Indians held in 1912. (R. 340–345.) It is not suggested, however, that this "adoption" was ever approved by the Secretary of the Interior. A tribal adoption to be valid must have such approval. *West* v. *Hitchcock*, 205 U. S. 80; *United States* v. *Mitchell*, 22 F. (2d) 771 (C. C. A. 9th). Accordingly, if these petitioners are not otherwise entitled to allot-

ments upon the Quinaielt Reservation, they are not entitled merely by reason of the alleged "adoption."

Petitioners also argue that the Chehalis, Chinook, and Cowlitz Indians have been deprived of their lands by the United States and, therefore, it would be inequitable to deny them rights on the Quinaielt Reservation. It is doubtful if this is a matter for judicial cognizance. It should be pointed out, however, that only a relatively small amount of their lands, if any, was included in the lands ceded to the United States in the Quinaielt Treaty. It should be further pointed out that by the Act of August 24, 1912, c. 388, 37 Stat. 518, 535, $32,000 was appropriated to be paid *per stirpes* to the Chinook Indians of Washington. Reference to the official payment rolls of the Indian Office shows that some of the petitioners and the parents of other petitioners appear thereon. Moreover, by the Act of February 12, 1925, c. 214, 43 Stat. 886, Congress has authorized Chinook and Chehalis Indians "with whom no treaty has been made" to submit to the Court of Claims claims of whatever nature, both legal and equitable, which these tribes or bands of Indians may have against the United States. Such suits are now pending in the Court of Claims. The Cowlitz Indians also would have been included in this statute but they objected to some of its provisions. (See House Report No. 1029, 70th Cong., 1st Session.)

CONCLUSION

The decrees of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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MARCH, 1931.

APPENDIX A

TREATIES, STATUTES, AND EXECUTIVE ORDER INVOLVED

The Treaty with the Quinaielt and Quillehute Indians of 1855 and 1856 (12 Stat. 971) provides, in part:

> Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian Affairs, of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.
>
> ARTICLE I.—The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.
>
> ARTICLE II.—There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts

of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE III.—The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

* * * * * *

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient

quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes, respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

* * * * *

Article 6 of the Treaty with the Omahas (10 Stat. 1043, 1044–1045), referred to in Article VI of the

Treaty with the Quinaielt and Quillehute Indians, provides:

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands as-

signed and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

The Executive Order of November 4, 1873 (Kappler, Indian Laws and Treaties, Vol. I, 2d Ed. pp. 923-924), reads as follows:

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart

for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, and with the line of said survey, 5 miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinaielt Lake; thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said river to a point on the Pacific coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

The General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, as amended by the Acts of February 28, 1891, c. 383, 26 Stat. 794, and June 25, 1910, c. 431, 36 Stat. 859 (U. S. C., Title 25, Sec. 331), provides, in part, as follows:

Section 1:

That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such

areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

Section 4:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children, in quantities, and manner as provided in this act for Indians residing upon reservations. (24 Stat. 389.)

Section 6:

* * * every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The Act of August 15, 1894, c. 290, Sec. 1, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, Sec. 1, 31 Stat. 760 (U. S. C., Title 25, Sec. 345), reads in part as follows:

That all persons who are in whole or in part of Indian blood or descent who are en-

titled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit [district] court of the United States; and said circuit [district] courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * * *Provided*, That the right of appeal shall be allowed to either party as in other cases.

The Act of June 7, 1897, c. 3, 30 Stat. 62, 90 (U. S. C., Title 25, Sec. 184), provides:

That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at

the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child or such right.

The Special Allotment Act of March 4, 1911, c. 246, 36 Stat. 1345–1346, provides:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes: *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

CONCLUDING PARAGRAPHS AND SIGNERS OF THE ABORTIVE TREATY PROPOSED BY GOVERNOR STEVENS TO THE INDIANS AT THE COUNCIL AT COSMOPOLIS, FEBRUARY 25, 1856.[1]

In testimony whereof, the said Isaac I. Stevens, Governor and Superintendent of Indian Affairs, and the undersigned Chiefs, headmen and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

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[1] Certified copies of this instrument have been filed by respondent in this court and served on counsel for petitioners herein.

Executed in the presence of us, the word "four" being written over an erasure in Article V, and the words "tribes and bands" interlined in Article VIII, before execution.

ISAAC I. STEVENS (Signed),
Gov. & Supt. Ind. Affairs.

TAHOLA (his mark),
Head Chief of Kwinaiult.

HEHT-LITETL (his mark) OR JOHN,
Sub Chief of do.

KEHP (his mark),
Sub Chief of do.

CAPTAIN (his mark),
Sub Chief of Quinaiult.

KLA-WAL-IT-HOW (his mark),
Sub Chief of do (Kwehts band).

HOO-YALT-SEE (his mark),
Sub Chief of do (Kwehts band).

APPENDIX B

STATEMENT OF THE EVENTS LEADING UP TO THE QUINAIELT TREATY OF 1855–1856 AND THE ESTABLISHMENT OF THE QUINAIELT RESERVATION

In 1853 Isaac I. Stevens, Governor of Washington Territory, was instructed by the President to negotiate treaties with the Indians in that Territory. As a result of his activities, numerous Indian treaties were effected in western Washington.[1] (R. 294.) In February, 1855, Governor Stevens called a council at Cosmopolis, on the Chehalis River (see map at p. 10, petitioner's brief), of representatives of the various tribes and bands of Indians in that region. There were present at this council, in considerable numbers, representatives of the Quinaielt, Cowlitz, Chinook, Upper and Lower Chehalis, and Quit Tribes. (R. 385, 386, 390, 426, 440, 442, 583.) It was the purpose of Stevens to have these various tribes cede their territory to the United States, and in exchange therefor to create a large reservation for them somewhere between Cape Flattery and Gray's Harbor, where

[1] See, for instance, the Treaty with the Makah Tribe at Neah Bay of January 31, 1855, 12 Stat. 939; the so-called Point no Point Treaty with the S'Klallams Tribes of January 26, 1855, 12 Stat. 933; the so-called Medicine Creek Treaty with the Nisqually, Puyallup and other Upper Puget Sound Tribes of December 26, 1854, 10 Stat. 1132; and a treaty with the Dwanish and allied Tribes of January 22, 1855, 12 Stat. 927. See Kappler, Indian Affairs, Laws and Treaties, Vol. II, pp. 665, 669, 674, 682.

they could all be placed. (See Swan, The Northwest Coast, pp. 343, 344.)

At the time of the Cosmopolis meeting, the Chinooks, Cowlitz, and Chehalis occupied or claimed, roughly, the land between the Nisqually and Quinaielt Indians on the north, the Cascade Mountains on the east, the Columbia River on the south, and the Pacific Ocean on the west.[2]

The Quinaielts, Quillehutes, Hohs, and Quits occupied or claimed, roughly, the land between the Makah Tribe on the north, the Skallams on the east, along the coast range of mountains to their intersection with the dividing ridge between the Chehalis and Quinaielt Rivers; the Chehalis on the south and the Pacific Ocean on the west.[3]

It appears that Stevens' effort to consummate the proposed treaty resulted in failure, apparently for the reason that the Cowlitz, Chinook, and Chehalis Indians objected to being placed upon a reservation to be located in the Quinaielt country, with the Indians of which they were not upon friendly relations. (See Swan, *ibid*, p. 345; R. 440.) Shortly thereafter a treaty was executed with only the Quinaielt and Quillehute Indians on July 1, 1855, and January 25, 1856, 12 Stat. 971. No separate treaty was made with the Chinook, Cow-

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[2] See map transmitted to the Commissioner of Indian Affairs by Governor Stevens on September 16, 1854, in pocket at the end of this brief, *infra*. See also 18th Annual Report of the Bureau of American Ethnology, Part 2, Indian Land Cessions, pp. 882–883. See also Senate Executive Document No. 1, 33 Cong., 2d Sess., Vol. I, pp. 447, 457.

[3] See map, p. 10, petitioners brief; see Indian Land Cessions, *supra*, pp. 808–809; see Senate Executive Document, *supra*, pp. 448, 457.

litz, and Chehalis Indians, nor with the Quits or Hohs. (R. 294.) The details of the Quinaielt Treaty and events subsequent thereto are stated by the Solicitor for the Interior Department in an opinion, dated October 12, 1916, which was introduced in evidence, as follows (R. 296–300):

> By the above treaty the Indians ceded to the United States a vast tract of country, including nearly 100 miles of the Pacific Coast, extending approximately from a few miles south of Cape Flattery to a few miles north of Gray's Harbor, and back from the coast some 30 or 40 miles to the middle of the coast range of mountains. Article 2 reserved an area sufficient for their wants to be selected by the President and "surveyed or located and set apart for their exclusive use," to which they agreed to remove. Article 3 secured to them the right of taking fish at all usual and accustomed grounds and stations in common with the citizens of the Territory. Article 4 provided that the money paid for their lands should be applied "to the use and benefit of the said Indians under the direction of the President." Article 5 made an appropriation to enable the Indians to remove to and settle upon the reservation to be selected for them and for other purposes. Article 6 provided that the President could at his discretion consolidate these Indians with other tribes and cause the whole or any part of the lands to be reserved under the treaty with such other lands as might be selected in lieu thereof to be surveyed into lots "and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a per-

manent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so fat as the same may be applicable."

In accordance with the provisions of the treaty a reservation was selected by the then Superintendent of Indian Affairs for Washington Territory and surveyed under contract, but as the same was too small to provide for the needs of the Indians, it was never formally set apart by Executive Order. The reservation selected was located on the Pacific Coast from about one-half mile north of the Quinaielt River to a point ten miles south of that river and about six miles back from the coast. In 1872 the Superintendent of Indian Affairs for Washington Territory reported and recommended as follows:

"All the tribes made parties to this treaty, together with the remanants of the Chehalis, Humptulups, Shoalwater Bay, and Chinook tribes, residing along this coast south of the reservation to the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish-eaters, and draw their subsistence almost wholly from the water, and therefore have but little taste or desire for agricultural or land productions.

* * * * *

"As the land north and west of this reservation, for many miles, has no attractions for white settlers, and as the Quilliutes, Hohs, and Quits do not reside on the reservation, and refuse to come on to it as at present constituted, and as there is but a small amount of agricultural and pasture lands on the reservation, I recommend that it be enlarged as follows: * * * The

reservation thus enlarged would afford two more fisheries on the Pacific coast, and perhaps several others around Lake Quinaielt, and would afford occasional patches of agricultural and grazing lands, and upon it should be collected not only the three tribes named, but also all the other tribes and bands of fish-eating Indians on the Pacific coast, from the south side of Neah Bay reservation to the mouth of the Columbia River; all of whom could find room and homes on this enlarged reservation."

In view of this report, the Indian Office, on October 31, 1873, recommended the enlargement of the reservation selected by the Superintendent so that the "Hohs, Quits, and other fish-eating Indians residing upon the coast between the Quinaielt river and Makah Indian Reservation may be induced to go upon the reservation," and by Executive Order of November 4, 1873, under authority conferred on the President by Article 6 of the treaty of 1855 and 1856, an enlarged reservation was set apart as follows:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory * * * be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: * * *" (See R. 296–300.)

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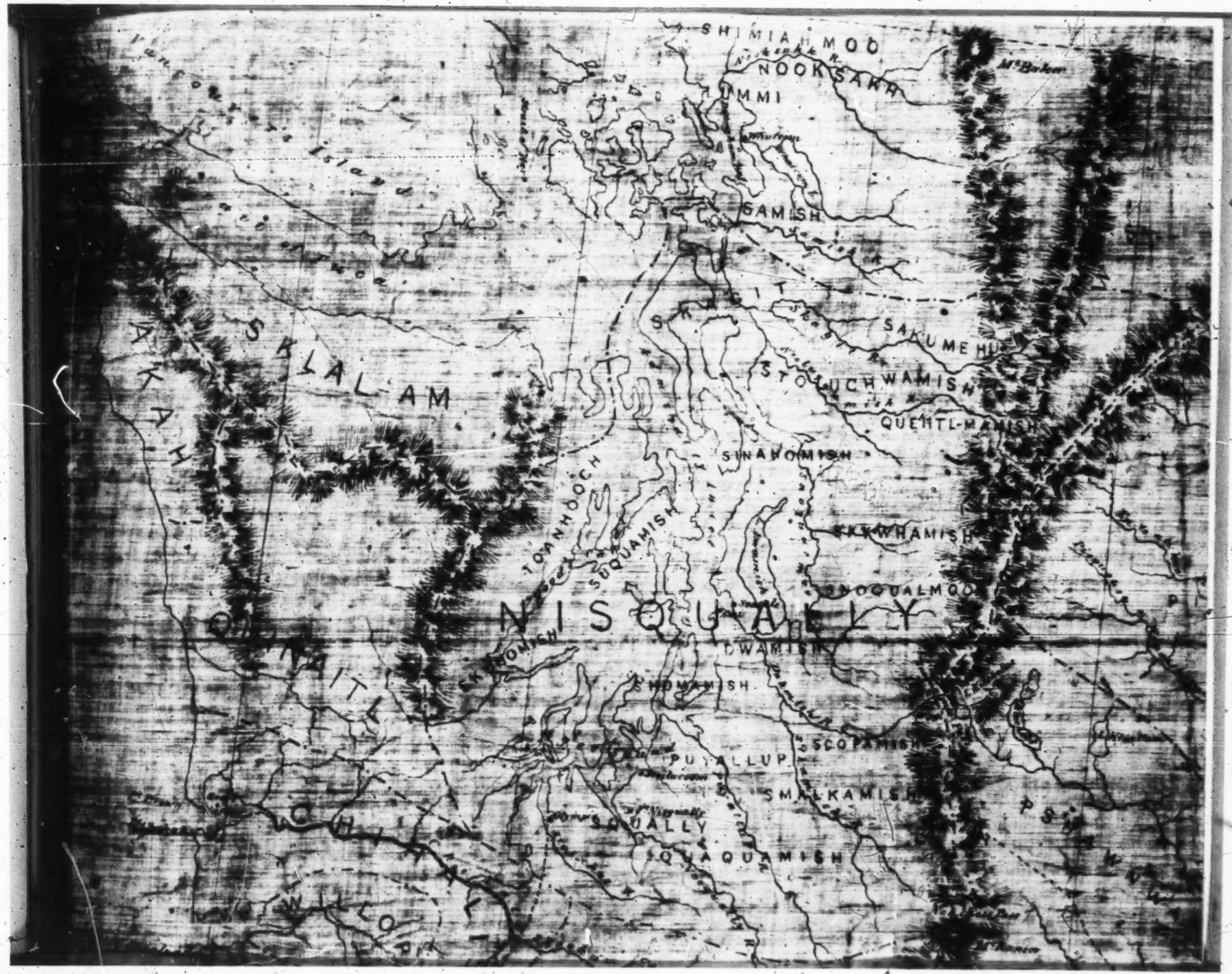
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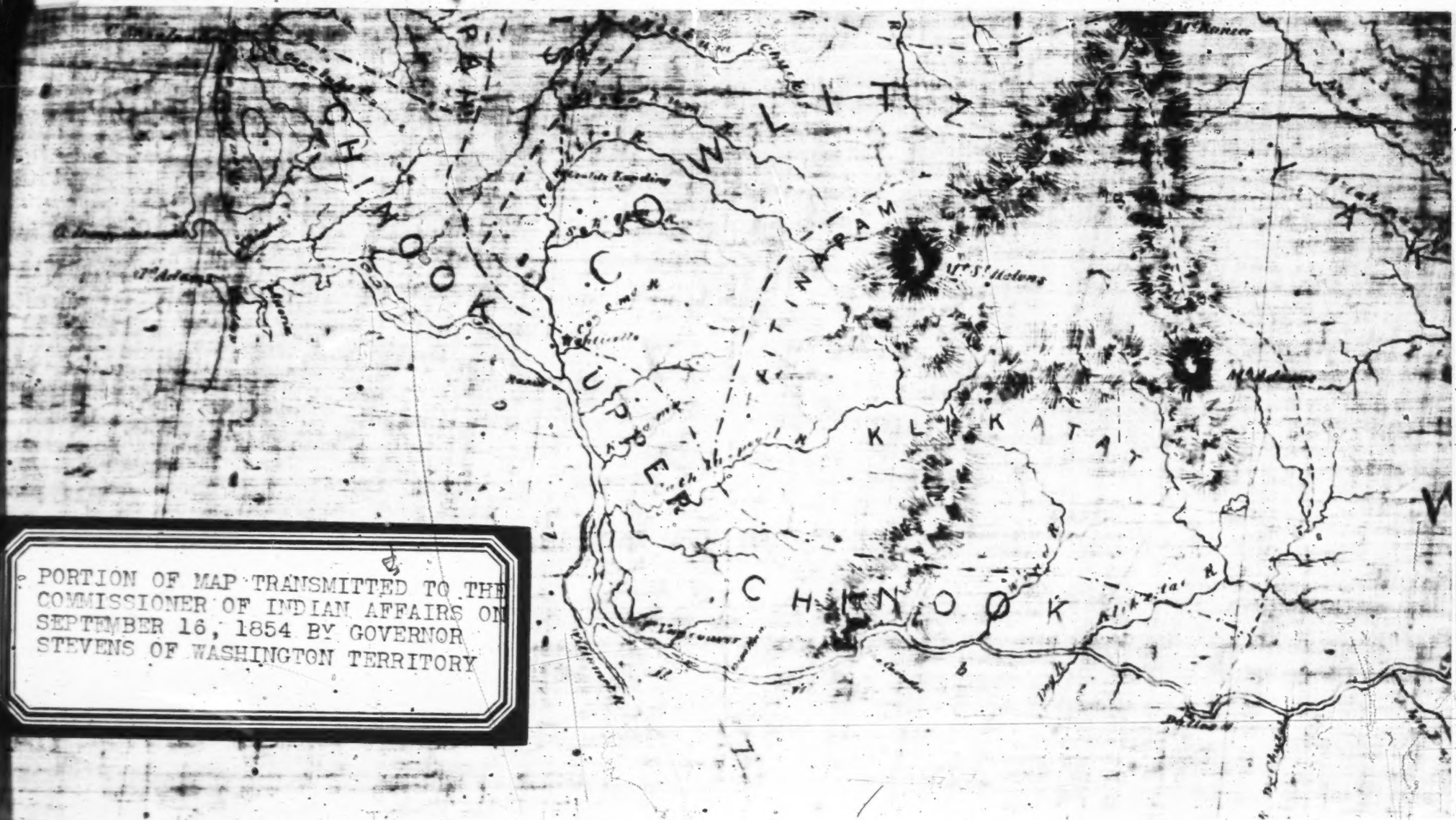

PORTION OF MAP TRANSMITTED TO THE COMMISSIONER OF INDIAN AFFAIRS ON SEPTEMBER 16, 1854 BY GOVERNOR STEVENS OF WASHINGTON TERRITORY

SUPREME COURT OF THE UNITED STATES.

Nos. 141-154.—October Term, 1930.

141 Hilary Halbert, Jr., et al., Petitioners,
vs.
United States.

142 Rich Halbert, Petitioner,
vs.
United States.

143 Vernon Sidney Halbert, Petitioner,
vs.
United States.

144 Sidney E. Halbert, Petitioner,
vs.
United States.

145 Rose Peers Pickernoll, et al., Petitioners,
vs.
United States.

146 Lulu M. Elliott, et al., Petitioners,
vs.
United States.

147 Mary Barichio Petit, et al., Petitioners,
vs.
United States.

148 Dewey Barichio, et al., Petitioners,
vs.
United States.

149 Edna May Elliott, et al., Petitioners,
vs.
United States.

150 Chas. G. Elliott, Jr., et al., Petitioners,
vs.
United States.

151 Agnes Rubens, et al., Petitioners,
vs.
United States.

152 Virginia Walkowsky, et al., Petitioners,
vs.
United States.

153 Lizzie Rolfson, et al., Petitioners,
vs.
United States.

154 Mary Francis Provoe, et al., Petitioners,
vs.
United States.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 1, 1931.]

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These suits were brought in the District Court for the Western District of Washington to establish and enforce asserted rights to allotments, each of 80 acres, in the Quinaielt Indian Reservation in the southwestern part of that State. Authority for bringing the suits is found in the statute providing that any person who is "in whole or in part of Indian blood or descent" and claims to be entitled to an allotment of land under any law of Congress may prosecute a suit against the United States to determine and give effect to such right.[1] The suits were heard together in the District Court, where decrees were given for the plaintiffs, and again in the Circuit Court of Appeals, where those decrees were reversed.[2] The cases are here on certiorari.

The plaintiffs are all of Indian blood and descent, but none is a full-blood Indian. Some are members of the Chehalis, Chinook and Cowlitz tribes, and the question is presented whether these tribes are among those whose members are entitled to allotments from lands within the Quinaielt Reservation. Many do not personally reside on the reservation, and we are asked to decide whether this defeats their claims. Some are the issue, either children or grandchildren, of a marriage between an Indian woman and a white man, and whether this is an obstacle to allowing their claims is a further question.

In 1855 the Quinaielt, Quillehute (also called Quileute), Chehalis, Chinook and Cowlitz Indians were neighboring tribes in the southwesterly section of what is now the State of Washington. They were all known as "fish-eating Indians" and lived in small villages adjacent to the Pacific coast and the lower reaches of the Columbia River. The Quits and Ozettes were also fish-eating tribes living in coast villages a little north of the others, the Ozettes being farther north that the Quits.

During the early part of 1855 negotiations were had between a representative of the United States and representatives of the Quinaielt, Quillehute, Chehalis, Chinook, Cowlitz and Quit tribes looking towards a cession by these tribes of much territory and their consolidation within a single reservation. These negotiations failed of their full purpose, but resulted in a treaty between the United States and the Quinaielts and Quillehutes which was

[1] Act of February 6, 1901, c. 217, 31 Stat. 760.
[2] 238 Fed. (2d) 795, 799, 805, 806.

signed on July 1, 1855 and January 25, 1856.[3] By this treaty the Quinaielts and Quillehutes ceded a large district to the United States, and the latter engaged to reserve for their use and occupancy a tract "sufficient for their wants", to which when established they were to remove. There were also provisions in the treaty securing to the Indians the right of taking fish "at all usual and accustomed grounds and stations", in common with all citizens of that section, and of erecting temporary houses to be used in that connection; authorizing the President, at his discretion, to survey the whole or any part of the reserved lands and assign the same to such individuals or families "as are willing to avail themselves of the privilege and will locate on the same as a permanent home"; and consenting that the President might "consolidate" the Quinaielts and Quillehutes and "other friendly tribes", whenever in his opinion the public interest and the welfare of the Indians would be promoted by it.

Under the treaty a reservation of about 10,000 acres at the mouth of the Quinaielt River was provisionally selected and its boundaries surveyed. Some years later the local superintendent reported that the reservation, by reason of being small and containing but a small amount of agricultural and pasture lands, had proved unattractive to the Indians; that the Chehalis, Chinook and other coastal tribes in southwestern Washington, like the Quinaielts and Quillehutes, who were parties to the treaty, were all "emphatically fish-eaters", drawing their subsistence almost wholly from the water, and that all of these fish-eating tribes should be collected on a single reservation, including suitable fisheries. To that end he recommended that the existing reservation be greatly enlarged and designated the territory which he believed should be included in it. This recommendation led to an order of November 4, 1873, by the President, the material parts of which are as follows:[4]

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856, and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory . . . be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, ..."

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[3] 12 Stat. 971.

[4] Executive Orders Relating to Indian Reservations (1912), p. 206.

This enlarged reservation contained about 200,000 acres and included the prior provisional reservation of 10,000 acres.

By an act of March 4, 1911,[5] Congress directed the Secretary of the Interior to make allotments on the Quinaielt Reservation under the provisions of the allotment laws "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty [before named] and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes". This direction was followed by a proviso declaring, "The allotments authorized herein shall be made from the surplus lands of the Quinaielt Reservation after the allotments to the Indians thereon have been completed". The reference to "other reservations" may be sufficiently explained by stating that some small reservations[6] had been set aside theretofore for particular villages of the Hoh, Quileute, Ozette, Quit, Chehalis and other fish-eating tribes, but that these reservations were in some instances limited to 640 acres and were in no instance large enough to provide allotments to more than a small fraction of the Indians thereon.

When the bill which became the Act of March 4, 1911, was introduced in Congress it contained a direction that allotments be made to "all members of the Hoh, Quileute and Ozette tribes of Indians in Washington who may elect" etc., and said nothing about other tribes; but in the course of its passage this provision was amended so as to read: "to all members of the Hoh, Quileute,[7] Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty [before named] and who may elect" etc. This shows that Congress intended to include tribes not included in the original provision; and it shows further that they were to be tribes having, like the Hoh and Ozette tribes, some affiliation with the Quinaielt and Quileute tribes "in the treaty". Probably "in" was used in the sense of "under" or "through". Strictly speaking there was no affiliation in the treaty. But the treaty did contain a provision under which affiliation might be brought about. It authorized the President to consolidate the Quinaielt and Quileute tribes with

[5] C. 246, 36 Stat. 1345.

[6] Executive Orders Relating to Indian Reservations (1912), pp. 172-175, 195, 200, 205, 206 (Shoalwater).

[7] Through some oversight the amendment placed the Quileute tribe on both sides of the affiliation.

other friendly tribes. Under this provision he made the order establishing the enlarged reservation for the use, not only of the Quinaielt and Quileute tribes, but also of the Hoh, Quit and other coastal tribes of fish-eating Indians "in that locality", evidently meaning in that section of the Territory of Washington.

That was a step towards consolidation. Other steps followed, one being that in 1905 the Indian Bureau began making allotments to members of all of these tribes. This work was carried on under the treaty, the executive order and the general allotment law, and it had progressed prior to the Act of 1911 to the point where over 750 allotments had been completed, more than half of which were to members of the various fish-eating tribes in that section other than the Quinaielt and Quillehute. It therefore was altogether appropriate at that time to speak of these other tribes as affiliated with the Quinaielt and Quillehute under the treaty.

The action of the administrative officers under the Act of 1911 has been almost uniformly in accord with the view just stated. In 1913 a bill was introduced in Congress to amend the Act of 1911 by specifically including the Cowlitz and some other fish-eating tribes in southwestern Washington not before named in the act; and in a letter responding to an inquiry about the need for the bill the Indian Bureau said: "It is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary". The Solicitor for the Department of the Interior so construed the treaty, executive order and Act of 1911 in an opinion rendered to the Secretary of the Interior, and that opinion was accepted as a guide in making further allotments. Possibly it was not followed when the administrative officers were dealing with the applications of the plaintiffs in these suits. As to that we are not advised. The record contains a stipulation showing that the applications were rejected but not disclosing the grounds of that ruling.

Our conclusion on the first question presented is that the Chehalis, Chinook and Cowlitz tribes are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere. The Circuit Court of Appeals held otherwise in some of the suits and in this we think it erred.

The Act of 1911 does not purport to make the right to an allotment dependent on a personal residence on the reservation. It is a special act relating only to this reservation. The land within the

reservation is generally covered with a heavy growth of timber and is difficult of clearing. As a rule the Indians are poor and would be without means of supporting themselves while attempting to clear the land. The treaty secures to them the right of taking fish at all usual and accustomed grounds. Most of them are fishermen, but a few find employment in lumber camps. Most of them have for many years resided in small villages outside the reservation. Some of the villages are within small reservations made by executive orders; but the majority of the Indians have always lived outside any reservation. When the Act of 1911 was passed more than 750 had been given allotments. Of these not more than 1 out of 5 had ever resided on the reservation. It is probable that Congress was advised of the situation of these Indians when the special act was passed and carefully refrained from placing anything in the act indicative of a purpose to make personal residence on the reservation an element of the right to an allotment.

These Indians are not the usual reservation Indians. They never were placed on the reservation or required to live within its limits. Their situation is quite like that of the Walla Walla tribe which at one time engaged the attention of this Court.[8] A special act directed the allotment of the lands of that tribe. In its title the act was described as providing for allotments to the Indians "residing upon" the reservation, and in its first sentence there was a direction that allotments be made to members of the tribe "residing upon" the reservation. After stating the situation to which the act was to be applied this Court said:

"When such a large percentage of allottees upon this reservation resided, as did the appellee, elsewhere than actually upon the reservation at the date of the passage of the act of 1885, it cannot be that the act passed was intended to limit the right to an allotment to those actually residing on the reservation to the exclusion of a majority of the members of the different bands or tribes. The fact of such non-residence is presumed to have been known to Congress, and the act should be construed with reference to that knowledge. . . . The purpose would fall very far short of accomplishment were the allotments confined exclusively to those actually residing within the limits of the reservation."

While the Act of 1911 provides that the allotments shall be made under the "allotment laws of the United States", we think this provision hardly could have been intended to make any pro-

[8] 194 U. S. 401, 408-412. And see Bonifer *v.* Smith, 166 Fed. 846.

vision in those laws requiring residence applicable to the situation we have described. The Act of 1911 is not merely silent respecting residence; it directs that allotments be made to "all members" of the tribes designated who elect to take allotments upon the Quinaielt Reservation rather than on "the reservations set aside for these tribes". These words are indicative of a purpose to exclude a residential requirement.

The record shows that the officers administering the act did not confine the allotments to Indians actually residing on this reservation or one of the small ones, and also that they informed applicants that residence was not required. Counsel for the government admit that such has been the practice, and they set forth in their brief a letter of June 13, 1930, from the Secretary of the Interior to the Attorney General reading as follows:

"The matter of residence upon the reservation was not insisted upon as a prerequisite to allotment, either before or after the passage of the Act of March 4, 1911 (36 Stat. L., 1345) so far as the Quinaielt and other Indians mentioned in the Act or those who were affiliated with the Quinaielt in the Treaty of 1855 and 1856 are concerned. A number of allotments have been made to those who have resided away from the reservation."

These considerations require, as we think, that personal residence on the reservation be held not essential under the Act of 1911 to the right to an allotment. The Circuit Court of Appeals took and applied the opposite view and in this we think it erred.

We come then to the question respecting the status of the issue, either children or grandchildren, of a marriage between an Indian woman and a white man.

The rule is general that, in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended.[9] Under the operation of this rule an Indian woman loses her tribal membership where she marries a white man, separates from the tribe and lives with him among white people. But it is the separation from the tribe rather than the marriage which puts an end to the membership. The marriage usually serves to explain the separation and illustrate that it is intentional and permanent. But where the woman remains in the tribal environment and continues the tribal affilia-

[9]Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307; Gritts *v.* Fisher, 224 U. S. 640, 642; Sizemore *v.* Brady, 235 U. S. 441, 446; La Roque *v.* United States, 237 U. S. 62, 66; Oakes *v.* United States, 172 Fed. 304, 307.

tion the membership is not affected. If the husband be a citizen of the United States, the woman by the marriage becomes also a citizen,[10] but there is no incompatibility between tribal membership and United States citizenship.

The children of a marriage between an Indian woman and a white man usually take the status of the father; but if the wife retains her tribal membership and the children are born in the tribal environment and there reared by her, with the husband failing to discharge his duties to them, they take the status of the mother.

Whether grandchildren of such a marriage have tribal membership or otherwise depends on the status of the father or mother as the case may be, and not on that of a grandparent.

As to marriages occurring before June 7, 1897, (as the marriages here did) between a white man and an Indian woman, who was Indian by blood rather than by adoption,—and who on June 7, 1897, or at the time of her death, was recognized by the tribe,—the children have the same right to share in the division or distribution of the property of the tribe of the mother as any other member of the tribe, but this is in virtue of the Act of June 7, 1897.[11]

So far as can be determined from the record the District Court rightly applied the rules stated in this opinion. The record does not purport to contain, and evidently does not contain, all the evidence that was produced on the hearing. The statement of it was prepared by counsel for the Government and the certificate is that the statement contains "all the evidence essential to the decision of the questions presented by the appeal of the defendant". The assignment of errors, which was then before the District Court, does not challenge the decision of any question of fact, but only rulings on questions of law. It is thus rather plain that the statement of evidence contains only so much of the evidence as was deemed essential to the decision of the latter. We now are asked to consider questions not raised by the assignment of errors and which cannot be properly decided without appropriate assurance that the record contains all the evidence that is material to their decision. We must decline to consider them.

Decrees of Circuit Court of Appeals reversed.
Decrees of District Court affirmed.

[10] Act August 9, 1888, c. 818, 25 Stat. 392.
[11] C. 3, 30 Stat. 90.

* Other modifications of the general rule are found in the Acts of March 3, 1875, c. 131, Sec. 15, 18 Stat. 420; February 8, 1887, c. 119, Sec. 6, 24 Stat. 390; August 9, 1888, supra, Sec. 2; May 8, 1906, c. 2348, 34 Stat. 182. And see Act June 2, 1924, c. 223, 43 Stat. 253.